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IN THE

Supreme Court of the United States

October Term, 1968

No. 651

PETER AANDAHL CHRISTOFFERSON, PAUL HOWARD DAVIS, CHRISTOPHER JOHN HAWKINS, JOYCE EDNA CHAKOS and PETER MICHAEL CHAKOS, *Petitioners*,

v.

THE STATE OF WASHINGTON, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Washington

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v.

THE STATE OF WASHINGTON, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Washington

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Washington, entered in consolidated cause number 38946* on July 18, 1968.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of the State of Washington is reported in 74 W.D.2d 156, and a copy is attached as Appendix A. The opinion incorporates the reasoning from a connected case arising out of the same facts, *State v. Walcott*, 72 W.D.2d 947, 435 P.2d 994

*The original cause numbers in the State of Washington Supreme Court, which were later consolidated into its cause number 38946 were as follows: Christofferson, 38969; Davis, 38972; Hawkins, 38970; Joyce Chakos, 39031; Peter Chakos, 38973. Christofferson and Hawkins were jointly charged and tried in King County Superior Court cause number 43443. The two Chakos were charged and tried jointly in King County Superior Court cause number 43444. Davis was charged and tried separately in cause number 43445. As appears from the record, some of the preliminary matters in all cases were consolidated.

(1968), and a copy of that opinion is attached as Appendix B. The *Walcott* matter is pending before this court on a petition for writ of certiorari in Miscellaneous No. 392.

JURISDICTION

The opinion of the Supreme Court of the State of Washington was filed July 18, 1968. Jurisdiction of this court is invoked under 28 U.S.C. 1257(3), in that: (a) the petitioners have specially claimed a right, privilege and immunity under the Constitution of the United States which has been denied by the action of the Supreme Court of the State of Washington; and (b) the validity of a State of Washington statute, as construed by the Supreme Court of this state is drawn in question on the ground of its being repugnant to the Constitution of the United States.

QUESTIONS PRESENTED

1. Do the Fourth and Fourteenth Amendments to the United States Constitution permit a magistrate to issue a search warrant without any contemporaneous record being made of the evidence?

2. Assuming that a record of the evidence presented to a magistrate to obtain a search warrant may be reconstructed from affidavits and testimony of the magistrate issuing the warrant, the prosecutor who presented it, and the police officers who applied for it, does such record in the case of each petitioner satisfy the standards of probable cause required by the Fourth and Fourteenth Amendments to the United States Constitution?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 69.33.430 of the Revised Code of Washington provides:

> "If, upon the sworn complaint of any person it shall be made to appear to any judge of the Superior Court or justice of the peace that there is probable cause to believe that any narcotic drug is being used . . . or kept in violation of the provisions of this chapter, such justice of the peace or judge shall, with or without the approval of the prosecuting attorney, issue a warrant directed to any peace officer in the county, commanding him to search the premises designated and described in such complaint and warrant, and to seize all narcotic drugs there found. . . ."

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Section 1 of the Fourteenth Amendment of the United States Constitution provides in its relevant parts to this petition as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

In November, 1965, application for a series of five narcotics search warrants was made to Evangeline Starr, a Seattle District Justice Court Judge (Rec. 19, 21). The complainants were two Seattle police officers, who were accompanied by a deputy prosecuting attorney and an informant who was not identified to Judge Starr except as the "informant" and was not sworn (Rec. 19, 21). The complaints for search warrants in the cases involved in this petition are included as Appendix C. A short hearing was held on the applications (Rec. 19, 21). The officers were apparently sworn (Rec. 19, 21, 23, 24), although one later denied this (Rec. 253-255), and testified and the informant, although not sworn, answered at least one question (Rec. 19, 21), but there is dispute as to the extent of her participation in the hearing (Rec. 269-310). The only contemporaneously made record which supports the issuance of the warrants was, in each case, the complaint. The entire record in each search warrant proceeding consists of the complaint for search warrant, a copy of the warrant and the return on the warrant. No docket entries were made, no list of witnesses sworn was made, and no testimony, sworn or unsworn, was recorded (Rec. 36, 179-180). The search warrants were issued, as a consequence of which various amounts of narcotics and dangerous drugs were seized and petitioners were prosecuted and convicted of possession thereof (Rec. 2, 112, 387, 441, 493).

Timely motions were made in all cases to quash the warrants and suppress the evidence on the grounds that constitutional standards of probable cause under the Fourth and Fourteenth Amendments to the United States

Constitution had not been met (Rec. 5, 422, 528). At this juncture the State offered affidavits from Judge Starr, the prosecuting attorney, and a joint affidavit of the two police officers, purporting to set forth what had transpired at the hearing, and setting forth in each case the purported recollections of the participants respecting the evidence presented to Judge Starr relating to probable cause (Rec. 10-34, 397-421, 503-527). These affidavits were all prepared by the prosecuting attorney and were interjected to correct the deficiencies of the various complaints. They are attached hereto as Appendix D, and were identical in all cases.

The Superior Court Judge to whom the motion to suppress was directed held in all cases "that the written complaint for the search warrant . . . alone fails to state sufficient probable cause for the issuance of a search warrant" (Rec. 8-9, 395-396, 496-497). This ruling was not contested by respondent in the court below.

However, in spite of petitioners' objections that consideration of such subsequently prepared affidavits violated the Fourth and Fourteenth Amendments to the United States Constitution, the Superior Court went on to rule, that the affidavits would be considered and that the various complaints, *considered together with the affidavits* "does show that sufficient evidence was presented to Judge Starr to constitute probable cause for the issuance of the search warrant." On this basis the motion to suppress was denied, but petitioners were given permission to examine on oath the various individuals who made affidavits in support of the search warrants and were given the right thereafter to renew the motion to suppress.

Judge Starr and the two detectives were examined under oath and this examination has been transcribed and is a part of the record (Rec. 165-261). The motions in each case were renewed (Rec. 115, 433, 495), and further evidence respecting what had purportedly transpired at the original hearing on the application for the search warrants was taken from the two policemen, the prosecutor and the informant (Rec. 163-164, 263-360), and thereafter the motions to suppress were again denied (Rec. 45-101, 361-384, 541-562).

Thereafter, each individual petitioner was tried and convicted. Each appealed to the Supreme Court of the State of Washington on grounds, *inter alia*, which are relied on here to support this petition. The only record in each case certified to the State Supreme Court was limited to the proceedings relating to the Federal Constitutional issues and the motions to suppress the evidence. From an adverse decision on that appeal this petition for a writ of certiorari is made. Petitioners and the State have stipulated that if the search warrants were improperly issued and the evidence seized was suppressed that the convictions should all be reversed (Rec. 107, 156, 434, 486, 567).

HOW FEDERAL QUESTION IS PRESENTED

In all cases timely motions were made at all stages of the proceedings prior to trial to quash the search warrants and suppress the evidence seized as a consequence thereof based upon rights claimed to arise from the Fourth and Fourteenth Amendments to the United States Constitution. From adverse rulings on these motions in the trial court, error was assigned on appeal to the Su-

preme Court of the State of Washington. In respect of these claims of federal constitutional right, two of the questions presented by petitioners to the Washington State Supreme Court were as follows:

> "1. Do the Fourth and Fourteenth Amendments to the United States Constitution require a magistrate to make a contemporaneous record of the evidence presented at the time a search warrant is issued, on the basis of which the magistrate concludes that probable cause exists?
>
> "3. Even assuming in the present cases that the supplementary affidavits and testimony of those present at the time of the issuance of the warrant may be considered along with the sworn complaints, was there sufficient probable cause shown as to each individual warrant?" (App. Br., p. 28)

As to these questions, the answers given by the court were as follows:

> "The principal assignment of error common to appellants is that the search warrants here involved were void in that they were procedurally defective and were issued without adequate showing of probable cause. The basis upon which appellants make this assignment of error are fully outlined and set forth in *State v. Walcott, supra,* and will not be repeated here. We have fully considered this assignment of error as it pertained to search warrant No. 0297 in the *Walcott* case, and since we find no material or significant variation in the procedure or in the circumstances relating to the issuance of search warrants Nos. 0294, 0295 and 0296, or as pertains to the hearings upon the respective motions to suppress the evidence accumulated pursuant to the search warrants, we adhere to our ruling in the *Walcott* case. Accordingly, we find this assignment of error to be without substantial merit." 74 W.D.2d 157.

The *Walcott* decision appears as Appendix B and states

in part as follows:

> "The defendant contends, however, that the Fourth Amendment to the United States Constitution requires that the complaint or affidavits must show probable cause on their face before a search warrant may issue. The defendant concedes* that the law of this state requires only an oath or affirmation to support a finding of probable cause. *State v. Malbeck*, 69 Wn.2d 695, 419 P.2d 805 (1966). He argues, however, that this state should follow the federal rule which requires that sworn statements in support of an application for a search warrant be reduced to writing.
>
> "Although the federal practice, which results in making and preserving a contemporaneous record of the proceedings before the magistrate may be preferable; however, it is not a constitutional requirement under the Fourth Amendment. We adhere to our ruling in *Malbeck* and the cases cited therein." 72 W.D.2d 954.

The Washington Supreme Court has thus construed the search warrant statute involved, R.C.W. 69.33.430 to permit the "sworn complaint" required to be oral and unrecorded.

REASONS FOR GRANTING WRIT

1. The Supreme Court of the United States should resolve the question of whether a person has the right to have a contemporaneous record made of the evidence presented to a magistrate to obtain a search warrant so that he can later obtain an effective, meaningful review when the sufficiency of the probable cause relied on is challenged. In this case, the State of Washington Supreme Court in no uncertain terms has said that the United States Constitution does not afford this right—that no contemporaneous record need be made and that oral

*The present petitioners never conceded this point.

testimony recorded nowhere but in the memory of the magistrate is sufficient. This is not in accord with the decision of the only state court which has apparently considered the precise point. *Glodowski v. State,* 196 Wis. 265, 220 N.W. 227 (1928).

> "It is an anomaly in judicial procedure to attempt to review the judicial act of a magistrate issuing a search warrant upon a record made up wholly or partially by oral testimony taken in the reviewing court long after the search warrant was issued. Judicial action must be reviewed upon the record made at or before the time that the judicial act was performed. The validity of judicial action cannot be made to depend upon the facts recalled by fallible human memory at a time somewhat removed from that when the judicial determination was made. This record of the facts presented to the magistrate need take no particular form. The record may consist of the sworn complaint, of affidavits, or of sworn testimony taken in shorthand and later filed, or of testimony reduced to longhand and filed, or of a combination of all these forms of proof. The form is immaterial. The essential thing is that proof be reduced to permanent form and made a part of the record which may be transmitted to the reviewing court." 196 Wis. 271, 220 N.W. 230.

Nor is the Washington Supreme Court interpretation in accord with the apparent view of the Fourth Amendment as it applies to federal proceedings. *Steele v. U.S.,* 267 U.S. 498, 69 L.Ed. 757 (1925). Rule 41(c), Federal Rules of Criminal Procedure.

No more precise clarification by the United States Supreme Court of the issue in question seems to exist than the tangential language in the *Steele* case, that, "Under that Title [XI of the Espionage Act of June 15, 1917, c. 30], in conformity with the Fourth Amendment,

the warrant can be issued only upon probable cause, supported by affidavit, particularly describing the property and place to be searched." 267 U.S. at 501, 69 L.Ed. at 759. Most recently, the Third Circuit has commented parenthetically to the same effect. In a footnote in *United States v. Sterling*, 369 F.2d 799 (3d Cir 1966), the court stated:

> "The lower court's alternative ground for upholding the search warrant was based on information not in the affidavit. Such an approach is legally unacceptable. The affidavit must be the exclusive support for the warrant." 369 F.2d 802, n. 2.

If this means that a contemporaneous record (whether by affidavit or otherwise) must be made of the facts upon which probable cause is found and a warrant issued *because of constitutional requirements*, then the Washington Supreme Court is in error and must be reversed. *Mapp v. Ohio*, 367 U.S. 643, 6 L.Ed.2d 1081 (1961), *Ker v. California*, 374 U.S. 23, 10 L.Ed.2d 726 (1963). If on the other hand the question is open, it ought to be considered, because of ominous implications involved in permitting state courts to undercut substantive constitutional rights by procedural devices.

The reason for requiring a contemporaneous record to be made of the evidence presented at a search warrant hearing ought to be clear, or judging from the Washington Supreme Court's opinion, ought to be made clear. If the requirement of probable cause is regarded as a substantive right, it is of little or no value without the concomitant right of an effective procedural means of reviewing such a determination, which perforce is impossible without a record to review. Review, to be meaningful, must be based on a record made at the time of the

hearing, and not upon the recollections of the prosecuting attorney involved who presents those recollections through affidavits prepared by him for the police and the judge to sign. Those involved in the issuance of search warrants certainly must realize that the question of probable cause may in some cases be subsequently challenged, and it is incumbent on them to establish such probable cause in a more or less permanent fashion at the time a warrant is issued. If probable cause in an *ex parte, in camera,* hearing can be written on the wind the right to be free from unreasonable searches may as well be nonexistent, the point being that there is little to be gained from breathing meaning and substance into the requirement of probable cause if the manner and procedure whereby it is established is uncontrolled. To permit probable cause to be established by *ex post facto* affidavits or testimony and thereby to eliminate the necessity of any written complaint, is to invite abuse of a constitutional right peculiarly within the province of the courts, and especially reviewing courts, to protect. Such a system, if permitted, would be little better than pre-signed warrants or a rule that searches and seizures are justified by what they turn up.

What petitioners ask is not that all of the technicalities of Federal Criminal Rule 41 be deemed to be a part of the law of the land. There is no inherent necessity that all the facts relied on be stated in a written affidavit or complaint. At least, however, the testimony taken, if it is oral, should be recorded, and the existence of a fundamental right should not be left to the vagaries of the memory of a magistrate who could probably remember the testimony two months later if it were suggested to

her (Rec. 198), or to the contents of an affidavit prepared for her to sign by the prosecuting attorney who presented the application in the first place (Rec. 16-17).

Review by the United States Supreme Court of this state court practice is thus essential to definitively answer the question of what procedural safeguards, if any, are implied in the Fourth Amendment, and to delineate the extent to which a contemporaneously made record is a constitutional requirement in search warrant cases. The problem was hinted at in *Aguilar v. Texas,* 378 U.S. 108, 12 L.Ed.2d 723 (1964), in a footnote, 378 U.S. 109, 12 L.Ed.2d 725, which seems only to have reference to how the evidence is presented and not whether it must be recorded, and is therefore not particularly instructive.

Apart from all else, the question here involved merits consideration by the court to examine (and hopefully reject) the notion that the dualism created by *Wolf v. Colorado,* 338 U.S. 25, 93 L.Ed. 1782 (1949), and abandoned in *Mapp v. Ohio,* 367 U.S. 643, 6 L.Ed.2d 1081 (1961), may be creeping back through the guise of State procedural legerdemain under which "probable cause" as a substantive requirement of the Fourth and Fourteenth Amendments becomes a will-of-the-wisp to be established in a state court setting after the fact should a search warrant be productive and later challenged for adequacy. In a federal setting, unless probable cause is shown on the face of affidavits filed, a search warrant would never be issued. The question is whether this is because the constitution forbids it or whether it is merely a federal rule of practice which the states are free to adopt or reject as they choose. If the latter is the case it is no exaggeration to point out that the ills of *Wolf v. Colorado*

will be with us once again, and that the dualism there created and later found wanting in *Mapp* will be invited to reappear as procedural peculiarities which effectively negate meaningful review of probable cause, thus insulating state court warrants effectively from constitutional objections. Because of the possibility of (indeed, in this case, the very existence of) such a development, the issue presented here merits consideration by the court.

2. The second issue presented as a basis for the grant of a writ of certiorari concerns the question of whether the record relied upon by the Washington State Supreme Court, in the case of each petitioner, was sufficient to satisfy the constitutional requirements of probable cause, as most recently expounded in *Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed.2d 723 (1964).

The trial court held, and this has not been disputed below by the State, that none of the original complaints for the three search warrants involved here stated probable cause. Assuming that consideration can be given to subsequently prepared affidavits and the later testimony of the participants purporting to relate what occurred at the time the warrants issued, there is still a fatal defect in the reconstituted record which merits consideration by the court, and reversal of the convictions.

The additional facts bearing on the question of probable cause set forth in the affidavits submitted after the motion of petitioners to suppress the evidence was made must, first of all, be considered in the light of the fact that the prosecuting attorney involved prepared those affidavits, and neither Judge Starr, nor, apparently, the police, had discussed them with the prosecutor before

being presented with them for signature (Rec. 16-17, 235). Judge Starr, when she testified, quite frankly confessed that the testimony about the various addresses was not identified for her and to reproduce it was somewhat difficult (Rec. 199). She stated that applications for search warrants always came from the prosecutor's office, and she has no reason not to grant them (Rec. 194), that in eighteen years she cannot recall ever having denied an application for a search warrant (Rec. 181), and added that it has always gone through the prosecutor's office first (Rec. 181).

One must also consider the affidavit of Officer Fawcett in the light of his testimony on two occasions. The affidavit he signed was prepared by the prosecutor on December 23, 1965. In it Fawcett stated that at the hearing on the warrants he was put under oath and testified to additional information about the various addresses. On January 12, 1966, approximately three weeks later he testified he did not recall testifying at that hearing (Rec. 253), that he did not recall if the prosecutor asked him anything, and did not recall if he had said anything loud enough so that the judge could overhear him (Rec. 254), and again, that he was not sworn in connection with the warrants (Rec. 258). A moment later, however on cross-examination by the prosecutor he remembered being put under oath with regard to another address not involved in any of the present proceedings (Rec. 259). On February 8, 1966, less than a month later, he again testified. This time he remembered that he was sworn on oath and testified about the various addresses (Rec. 344). He also remembered he had overheard some of the conversation, but had forgotten it (Rec. 350-351), except that generally

the substance of it was the fact that there were drugs in those particular addresses, but he didn't recall about discussion on a particular individual or name (Rec. 353-354). He said the affidavit of December 23 was truthful (Rec. 354), and that on that date he recollected what information he had related to Judge Starr, but that he forgot it on January 12, 1966, when he first testified, and remembered again on February 8, 1966 (Rec. 355), but couldn't remember the specific information (Rec. 353-354).

The prosecutor testified on February 8, 1966, that it was difficult for him to separate out the addresses and also the specific information that was given on each address (Rec. 314).

The prosecutor-prepared affidavits, themselves, which purport to reconstruct the proceedings and the oral unrecorded testimony (unsworn as well as sworn) are attached hereto as Appendix D, and little need be said here about the content of these affidavits measured against the requirements of *Aguilar*. The point here is that even assuming these affidavits can constitutionally be considered on a challenge to the sufficiency of the probable cause on the basis of which the warrants were issued, there are genuine constitutional questions respecting whether there has been compliance with the standards set forth in *Aguilar*. These questions put simply, are whether on the basis of these affidavits the magistrate has been informed of:

(1) some of the underlying circumstances from which the informant concluded that the narcotics were where she claimed they were; and

(2) some of the underlying circumstances from which the officer concluded the informant was "credible" or her information "reliable."

Petitioners submit that neither of these questions can be answered affirmatively, and that this case presents an appropriate record against which the language in *Aguilar* can and should be further expounded and clarified. Particularly is this the case because of the presence at the initial hearing of the anonymous informant, whose identity became known and whose testimony regarding the hearing sheds considerable light on the practice of using anonymous informants and on the propriety of constitutionally permitting the practice to continue.

CONCLUSION

For the reasons stated the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

[Nos. 38946, 38969, 38970, 38971, 38972, 38973, 39031. En Banc. July 18, 1968.]

THE STATE OF WASHINGTON, *Respondent*, v. JOYCE EDNA CHAKOS *et al.*, *Appellants*.

THE STATE OF WASHINGTON, *Respondent*, v. JAMES C. WALL, *Appellant*.

THE STATE OF WASHINGTON, *Respondent*, v. PAUL HOWARD DAVIS, *Appellant*.

THE STATE OF WASHINGTON, *Respondent*, v. PETER AANDAHL CHRISTOFFERSON *et al.*, *Appellants*.*

Consolidated appeals from judgments of the Superior Court for King County, No. 43441, Lloyd Shorett, J., entered May 24, 1966; No. 43443, Donald L. Gaines, J., entered May 23, 1966; No. 43444, Lloyd Shorett, J., entered May 24, 1966; and No. 43445, Lloyd Shorett, J., entered June 2, 1966. No. 43441 *remanded;* others *affirmed.*

Prosecutions for possession of marijuana and for possession of a dangerous drug. Defendants appeal from convictions and sentences.

Byron D. Coney, for appellants Chakos *et al.*

Clinton, Moats, Anderson & Flock, by *Richard J. Glein,* for appellant Coleman (appointed counsel for appeal).

Charles O. Carroll and *Thomas A. Stang, for* respondent.

HAMILTON, J.—This is a consolidation of six separate appeals from convictions for possession of marijuana in violation of the Uniform Narcotic Drug Act, R.C.W. 69.-33, and, in one case, from a conviction for possession of a dangerous drug (amphetamines), a misdemeanor under the provisions of R.C.W. 69 40.

All appellants were arrested on the same evening at a total of three different locations in the city of Seattle. The convictions obtained in all cases, save that of appellant Wall, were based on evidence seized pursuant to a series of five search warrants (Nos. 0293, 0294, 0295, 0296 and 0297) issued at a single hearing before Justice of the Peace Evangeline Starr on November 5, 1965. The circumstances and conditions giving rise to the issuance of the respective search warrants are outlined and set forth in *State v. Walcott*, 72 W.D.2d 947, 435 P.2d 994 (1968), an appeal from the fruits of search warrant No. 0297. On this appeal we are concerned with search warrants Nos. 0294, 0295 and 0296. Search warrant No. 0293 was nonproductive, in that the party involved was acquitted.

The principal assignment of error common to all appellants is that the search warrants here involved were void in that they were procedurally defective and were issued without adequate showing of probable cause. The basis upon which appellants make this assignment of error are fully outlined and set forth in *State v. Walcott, supra*, and will not be repeated here. We have fully considered this assignment of error as it pertained to search warrant No. 0297 in the *Walcott* case, and since we find no material or significant variation in the procedure or in the circumstances relating to the issuance of search warrants Nos. 0294, 0295 and 0296, or as pertains to the hearings upon the respective motions to suppress the evidence accumulated pursuant to the search warrants, we adhere to our ruling in the *Walcott* case. Accordingly, we find this assignment of error to be without substantial merit.

The remaining assignments of error are made by appellants Coleman, Joyce Chakos, and James Wall. These as-

signments of error revolve about incidents arising out of the search of the premises located at 2303 N.E. 65th Street, Seattle, Washington, pursuant to search warrant No. 0296. In this respect, appellants Coleman and Joyce Chakos challenge the sufficiency of the evidence to sustain their convictions. Appellant Coleman urges, in addition, that he was not fully advised of his rights prior to making certain incriminating statements; and appellant Wall asserts the invalidity of a search of his automobile parked in the public street adjacent to the premises. A brief resume of the circumstances surrounding the search, arrest, and conviction of these appellants will assist in an understanding of our disposition of these assignments.

The premises located at 2303 N.E. 65th Street, consist of a 6-room house with a partial basement. The main floor contains a living room, dining room, kitchen, bathroom, and two bedrooms. Some 4 months prior to November 5, 1965, the evening of the search, the premises were rented by the appellants Peter and Joyce Chakos, there being some testimony that Mrs. Chakos negotiated the rental transaction. These appellants thereafter sublet one of the bedrooms to a Mrs. Marjorie Wall, her small daughter, and her friend Robert Ramoy, and the living room to appellant Coleman who occupied it as a bedroom. In addition to the living room, appellant Coleman who was interested in sculpturing, also had access to and use of the basement where he worked and kept his sculpturing materials.

When the officers executed their search warrants at about 9 p.m., November 5, 1965, Mr. and Mrs. Chakos, Mr. Coleman, Mr. Ramoy, a Mr. Al Moss, and Mrs. Wall and her young daughter were present in the house. With

the exception of Mr. Moss, who remained in the kitchen with some of the officers, all of the occupants were assembled in the dining room where they were advised by the officers of their constitutional rights and of the basis for and purpose of the search. The ensuing search revealed three growing marijuana plants and some seeds in the basement, a jar of marijuana seeds in the bedroom occupied by Mrs. Wall and Mr. Ramoy, a jar of marijuana seeds and leaves in the living room, a type of amphetamine (methamphetamine) in the kitchen refrigerator and in the living room, the remains of two marijuana cigarettes, one in the living room and one in the dining room, sundry paraphernalia consisting of hypodermic needles and syringes, a black metal pot, and a pipe in various of the rooms, including the living room, and a soot blackened spoon found in appellant Coleman's jacket.

None of the appellants made any incriminating statements during the search, except Mr. Chakos who acknowledged ownership of the marijuana seeds found in Mrs. Wall's bedroom. The next morning, however, appellant Coleman, after again being advised of his rights to counsel and to remain silent, admitted that he used marijuana and methamphetamine, the latter by injection. He also permitted inspection of his arms, which carried numerous puncture marks, some of recent origin.

During the course of the search, appellant James Wall came to the house. The purpose of his visit was to see his estranged wife, Mrs. Wall, and his daughter. When he entered the house, he was advised of the nature and purpose of the search being conducted, searched for weapons, advised of his rights, and asked if his automobile could be searched. Although Mr. Wall denied that per-

mission to search his automobile was requested or granted, four officers testified that he freely gave his consent. The search revealed a packet of marijuana in the vehicle.

Appellant Wall was charged with unlawful possession of marijuana, a felony. Appellants Coleman and Joyce Chakos, together with her husband appellant Peter Chakos, were charged with the same offense as well as unlawful possession of a dangerous drug, a misdemeanor. Appellant Wall was tried before a jury and found guilty as charged. Appellants Coleman and Joyce Chakos waived jury trial and were convicted by the court, sitting without a jury, of the crimes of unlawful possession of a dangerous drug and unlawful possession of marijuana, respectively.

Mrs. Chakos contends the evidence fails to establish that she was in possession of any marijuana. With this contention we disagree. The evidence clearly demonstrates that she, with her husband, was in control of the premises; that she and her husband let rooms to other tenants; that she participated in cleaning and maintaining the premises; that it was common knowledge among the occupants of the household that narcotics were used and tolerated in the residence; that marijuana in one form or another was present in virtually every room; and that marijuana plants were growing in the basement. Under these circumstances the question of whether Mrs. Chakos knew of and was in actual or constructive possession of marijuana became a question of fact to be decided by the trier of the facts. In our view the evidence amply sustains the trial court's finding of guilt. *State v. Weiss*, 73 W.D.2d 379, 438 P.2d 610 (1968).

Likewise, we find no merit in appellant Coleman's as-

sertion that the evidence fails to sustain his conviction of unlawful possession of a dangerous drug. The evidence reveals that amphetamine (methedrine) crystals were found in the living room occupied as a bedroom by appellant Coleman; that hypodermic paraphernalia was also in the room; that a soot blackened spoon in his jacket; that he was an admitted user of marijuana and amphetamines, the latter by injection. The evidence further indicated that the usual method of reducing the type of amphetamines (methedrine) found in appellant Coleman's room to liquid form for injection by hypodermic was to place the crystals in a spoon or like container and heat the same over a flame. It would be naive indeed to conclude that appellant Coleman was not in unlawful possession of amphetamines on the evening in question. The trial court's finding of guilt upon this score is fully supported by the evidence. We will not disturb the finding. *State v. Weiss, supra.*

Appellant Coleman next asserts that he was not advised of his constitutional rights prior to making his admission that he was a user of drugs. The evidence refutes this assertion, for the version of events accepted by the trial court indicates that appellant Coleman was fully apprised of his rights on three separate occasions prior to making his admission, and that he voluntarily chose not to exercise his right to remain silent or to have counsel present. The trial court did not err in receiving appellant Coleman's admission in evidence. *State v. Darst,* 65 Wn.2d 808, 399 P.2d 618 (1965).

Appellant Wall contends that the marijuana found in his automobile was the product of an unlawful search, in that he did not freely and voluntarily consent to a search

of his vehicle. The issue of law and fact raised by appellant Wall in this respect was considered by the trial court in a hearing which was, by stipulation, conducted as if it was a CrR 101.20W hearing on the admissibility of a confession. At this hearing four police officers testified that after appellant Wall was advised of his rights and informed of the reason for the officers' presence on the premises he was asked if his automobile could be searched to which he replied, "Sure, go ahead." Appellant Wall disputed the officers' testimony and produced another witness who testified that the officers did not ask appellant Wall's consent to search his automobile. Furthermore, appellant Wall asserts that if he in any fashion gave his consent the same was the result of coercion.

At the conclusion of the hearing, the trial judge, by oral decision, indicated his belief of the version advanced by the police officers; however, he expressed some doubt as to whether the consent given by appellant Wall was free of coercion. In this respect the trial judge stated:

> Gentlemen, I haven't any doubt but what the police officers, now being widely aware of the requirement that they inform a defendant of his rights, did inform this defendant that he had a right to an attorney and that anything he said might be used against him in a court of law.
>
> Then the testimony goes on, of not one but four police officers, to the effect that he was asked if they could search his car, and that he said, "Sure, go ahead." There was no direct coercion except the fact that when he came in the officers had pounced on him, and, as they say, shook him down to see if he had a weapon on his person, and the fact that he was advised that the officers were searching for narcotics; that his daughter and his wife, who is now living with another man, were in the other room. If those things are coercion, then, of course, there was some implied coercion here.

> I would prefer to find here that the defendant was informed of his rights, and that he was asked if the officers might search his car, to which he gave consent, and that the surrounding facts and circumstances at that time do not in law constitute coercion. Then if an appellate court wishes to review this some time, they could apply their own understanding of the law to this state of facts.
>
> . . .
>
> I think it is a question of whether there is implied coercion, and on that issue, at least for the present time, I find that there was no such implied coercion. The motion to suppress will be accordingly denied.

[1] No formal findings of fact or conclusions of law, as required by CrR 101.20W, were thereafter entered on the question of whether appellant Wall did, in fact, consent to the search of his automobile, and whether, if such consent was given, it was truly voluntary and uncoerced as required by the Constitution and the cases in this state. *State v. Greco,* 52 Wn.2d 265, 324 P.2d 1086 (1958).

In view of the reservations seemingly held by the trial court with respect to the validity of the disputed consent, and because the trial court had the benefit of the presence of the respective witnesses and perforce would be in the best position to evaluate their testimony, we deem it advisable to remand appellant Wall's case to the trial court for the purpose of entering appropriate and specific findings of fact and conclusions of law upon the consent issue.

The judgments appealed from are, with the exception of the judgment in appellant Wall's case, affirmed.

FINLEY, C. J., HILL, WEAVER, ROSELLINI, HUNTER, HALE, and NEILL, JJ., concur.

APPENDIX B

THE STATE OF WASHINGTON, *Respondent*, v. IRVING JAMES WALCOTT, *Appellant*.*

Appeal from a judgment of the Superior Court for King County, No 43442, James W. Mifflin, J., entered May 27, 1966. *Affirmed.*

Prosecution for unlawful possession of narcotics. Defendant appeals from a conviction and sentence.

Robert L. Butler and *Arnold J. Barer*, for appellant.

Charles O. Carroll, Thomas A. Stang, and *Bruce W. Rudeen*, for respondent.

HUNTER, J.—This is an appeal by the defendant (appellant), Irving James Walcott, from a conviction for the possession of marijuana. The assignment of error upon which the defendant primarily relies is to the trial court's denial of the defendant's motion to suppress certain evidence seized pursuant to a search warrant.

On November 5, 1965, at approximately 5 o'clock in the afternoon, King County Deputy Prosecuting Attorney Thomas A. Stang filed complaints for search warrants in the Seattle District Justice Court of magistrate Evangeline Starr. Seattle police detectives R. W. Waitt and A. L. Fawcett were present at this time.

In addition to the allegations of the respective complaints, oral testimony with reference to the propriety of issuing the search warrants was received by the magistrate. She determined that probable cause had been established for the issuance of search warrants for five locations in Seattle. In this case we are only called upon to determine the legality of search warrant No. 0297 is-

sued by the magistrate for a search of the premises located at 5514½ - 11th Ave. N.E., Seattle.

The complaint for search warrant No. 0297 was signed by Detective Waitt. The pertinent portion of the complaint reads as follows:

> [T]hat affiant's belief is based upon the following facts and circumstances: Received information from informant who was present when the marijuana was purchased in Mexico and brought to Seattle. Informant was present when the marijuana was brought to the house and has seen the marijuana in the house this date.

The informant was at the hearing before the magistrate. The police officers did not disclose her name and the state did not elect to have her testify under oath. The informant was not previously known to the officers and they had had no past experience with her. However, the officers testified under oath as to their testing of the reliability of her statements concerning the information furnished. The court questioned the informant as to the truth of statements she made to the officers. She affirmed the statements.

The residence at 5514 ½- 11th Ave. N.E. was searched at approximately 9 p.m., November 5, and about 30 pounds of marijuana were seized. Defendant Walcott resided at this address and was present at the time of the search. He was arrested after the discovery of the marijuana. The defendant prior to his trial moved to suppress the evidence seized, challenging the finding of probable cause for issuance of the search warrant.

In view of the fact that no written record was made of the hearing before the magistrate, affidavits of magistrate

Starr, Deputy Prosecuting Attorney Stang and detectives Waitt and Fawcett were obtained. These affidavits purport to relate what occurred at the hearing on probable cause for issuance of the search warrants. They were considered on the motion to suppress evidence. A special hearing was then ordered by the trial judge in order to provide persons arrested in the aftermath of the searches an opportunity to examine the magistrate, the deputy prosecuting attorney and the detectives as to the contents of the affidavits and the proceedings before the magistrate. At this special hearing, the magistrate and the two detectives were examined and this testimony was transcribed. On February 3, 1966, based upon the affidavits and the transcript of the special hearing, the defendant's motion to suppress the evidence was denied.

The defendant contends that the evidence adduced before the magistrate did not show probable cause for the issuance of search warrant No. 0297 as a matter of law under the fourth amendment to the United States Constitution.

[1] In considering this contention it must be kept in mind that the question of whether probable cause justified the issuance of a search warrant should not be viewed in a hypertechnical manner. The United States Supreme Court emphasized this in *United States v. Ventresca,* 380 U.S. 102, 13 L.Ed.2d 684, 85 Sup. Ct. 741 (1965), at 109:

> [W]hen a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a common-sense, manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable

> cause, *the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.* (Citing case.) (Italics ours.)

In *Aguilar v. Texas*, 378 U.S. 108, 111, 12 L.Ed.2d 723, 84 Sup. Ct. 1509 (1964), the court explained:

> Thus, when a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant," *ibid.*, and will sustain the judicial determination so long as "there was substantial basis for [the magistrate] to conclude that narcotics were probably present . . .

[2] In this case, the crucial factual issue is whether the information furnished by the unidentified informant was sufficiently reliable to support the magistrate's determination of probable cause for the issuance of the warrant authorizing the search of the premises where defendant Walcott resided. The rule for testing the sufficiency of such information was stated in *Aguilar, supra*, at 114:

> [T]he magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, . . . was "credible" or his information "reliable."

The evidence in the instant case to be considered in light of these rules is as follows:

Prior to the application for a search warrant, the unidentified informant voluntarily told officers Fawcett and Waitt of the Seattle Police Department that she had been

present when a large quantity of marijuana was purchased in Mexico and brought to 5514½ - 11th Ave. N.E. in the University District. She related that she had visited five addresses in the University District where she had seen marijuana and she gave the names of some of the persons living at these locations. Officers Fawcett and Waitt, in company with the informant, checked these addresses and found them to be identical with addresses which had been the subject of prior investigations concerning suspected trafficking in narcotics by persons who included those named by the informant. The officers repeated this information under oath to the magistrate, at the time of application for search warrants for these premises.

At the hearing on the defendant's pretrial motion for suppression of the evidence, the information disclosed by officers Fawcett and Waitt to the magistrate was set forth in their affidavit as follows:

> That on November 5, 1965 in the afternoon, a person came into the Narcotics Detail office and stated that this individual had some information to give us regarding the location of narcotics, LSD-25 and marihuana, in the University District in Seattle; that the informant was interviewed by both your affiants; that your affiants, after the interview contacted Deputy Prosecutor Thomas A. Stang for assistance in obtaining search warrants for the places mentioned by the informant; that Detective Fawcett went out with the informant to check the addresses of each of the places mentioned by the informant; that when Detective Fawcett and the informant returned, all went to the prosecutor's office to discuss getting a search warrant; that after a discussion, the complaints were prepared and Deputy Stang, together with the informant and your affiants, went to Judge Starr's Court to ask for the search warrant;

That your affiants were put under oath and Detective R. W. Waitt signed the various complaints; that your affiants then explained to Judge Starr what additional information your affiants knew about each of the addresses as follows:

Regarding 2303 N.E. 65th, Seattle, Washington, your affiants stated that this was the residence of Al Moss who had been suspected to be trafficking in dangerous drugs and narcotic drugs; that this information was obtained from reliable informants; that the house had been observed on previous occasions and suspected users of narcotics had been seen entering and leaving the premises;

Regarding 4243 11th N.E., Seattle, Washington, your affiants advised that the house was occupied by Paul Davis; that your affiants had received information from other reliable informants that Paul Davis was trafficking in narcotic and dangerous drugs; that Paul Davis drove a Meteor Hearse and was using his Hearse to carry narcotics;

Regarding 5514½ - 11th N.E., Seattle, Washington, your affiants advised that this was the residence of Irving Walcott, a partner in the Eigerwand Coffee House in the University District where many of the suspected drug users in the University District congregate; that Walcott and the Eigerwand had been suspected as a source of marihuana and dangerous drugs in the District since March of 1965 when it came to the attention of the Seattle Police Department from informants that both were involved;

Regarding 3818 - 4th N.E., Seattle, Washington, your affiants advised that one of the residents at this address was Peter Christofferson who had previously been arrested on suspicion of a narcotics offense involving marihuana, although not charged; that officers had observed suspected narcotics users in the past month entering and leaving the premises; . . . .

The magistrate submitted an affidavit at the same hearing containing the following:

That on the 5th day of November, 1965, she was asked by the Seattle Police Department and the King County Prosecutor's Office to issue search warrants for the following addresses located in Seattle, King County, Washington: 5514½ - 11th Avenue N.E., 102 Broadway East, 2303 N.E. 65th, 4243 - 11th Ave. N.E. and 3818 - 4th Avenue N.E.;

. . . .

That prior to the issuance of the search warrants both Detective A. W. Fawcett and Detective R. W. Waitt were sworn on oath and gave testimony under the questioning of Mr. Stang and the undersigned; that the testimony elicited revealed that the informant was present when a large quantity of marihuana was purchased in Mexico; that the purchasers then proceeded by airplane to California, specifically the Berkeley area where some of the marihuana was left and about 600 capsules of a drug commonly known as LSD was purchased; that the party then came to the Seattle area with marihuana and that most of this marihuana was presently in a suitcase at 5514½ - 11th Avenue N.E.; that the informant on the 4th day of November, 1965, had visited all the above addresses mentioned and seen quantities of marihuana at each of the places as well as drugs classified as dangerous drugs; that the detectives were asked specifically what information the Seattle Police Department Narcotics Detail had about each of the above listed addresses. As the warrants were each individually considered, the detectives explained who lived at the premises and who was seen entering and leaving the premises during the recent weeks; that although your affiant cannot remember specifically any names, the police reported that these were the same persons that the department had had trouble with in the University District Area of Seattle and each of them has been suspected of dealing with and using narcotic drugs; that the department had received reliable information from other reliable informants that these persons were involved in the unlawful drug activity in the university area;

Your affiant was introduced to the informant, although the name was withheld, and although not put

> under oath the informant was asked whether or not the informant had seen narcotics, specifically marihuana at the above addresses as per the statements of the detectives in their affidavits; that the informant replied, "yes"; . . . .

Considering the above affidavits in their entirety, which the trial court believed, we are satisfied that the sufficiency and reliability of the information given by the unidentified informant was adequate under the requirements established by *Aguilar, supra,* to justify the issuance of the warrants. (1) The underlying circumstances upon which the informant based her report were fully disclosed to the magistrate, and these circumstances included personal observation of the narcotics at the locations named. (2) The underlying circumstance demonstrating that the informant's information was reliable was the police officers' comparison of the names and addresses given by the informant with prior reliable information in possession of the police concerning persons and locations suspected of being involved in narcotics violations, and the coincidences disclosed by this comparison.

In every instance, the residents of the premises were suspicioned of trafficking in narcotics by reason of prior investigations of the officers. Some of the same individuals asserted to have been seen at these premises by the informant were these persons. This justified reliance on the reliability of the informant's information.

It is contended, however, that the prior information that the defendant Walcott was suspected of trafficking in marijuana and dangerous drugs was furnished by untested informants. This is not supported by the record. The officers' affidavit does not refer to these informants as untested or unreliable, and the magistrate's affidavit

conclusively shows that she was told by the officers that these informants *were* reliable. That portion of the affidavit reads:

> As the warrants were each individually considered, the detectives explained who lived at the premises and who was seen entering and leaving the premises during the recent weeks; that although your affiant cannot remember specifically any names, the police reported that these were the same persons that the department had had trouble with in the University District Area of Seattle and each of them has been suspected of dealing with and using narcotic drugs; that the department had received *reliable information from other reliable informants that these persons were involved in the unlawful drug activity in the university area;* . . . . (Italics ours.)

If doubts are entertained as to the sufficiency of the information in this record to show probable cause justifying the issuance of the challenged search warrant, these must be resolved in favor of the validity of the warrant. *United States v. Ventresca, supra; Aguilar v. Texas, supra.*

[3] The defendant contends, however, that the fourth amendment to the United States Constitution requires that the complaint or affidavits must show probable cause on their face before a search warrant may issue. The defendant concedes that the law of this state requires only an oath or affirmation to support a finding of probable cause. *State v. Malbeck*, 69 Wn.2d 695, 419 P.2d 805 (1966). He argues, however, that this state should follow the federal rule which requires that sworn statements in support of an application for a search warrant be reduced to writing.

Although the federal practice, which results in making and preserving a contemporaneous record of the proceed-

ings before the magistrate, may be preferable; however, it is not a constitutional requirement under the Fourth Amendment. We adhere to our ruling in *Malbeck* and the cases cited therein.

The defendant further contends the evidence seized under the search warrant at 5514 ½- 11th Ave. N.E. was not in his possession, as it was not in the room he occupied; and that the remainder of the dwelling was not under his dominion or control. The evidence as to his control of the premises was in dispute. But there was substantial evidence in the record, which the jury was entitled to believe, that the defendant was in charge of the entire premises in the absence of a Miss Leaf, who at the time of the seizure of the evidence, was in California. This contention is therefore without merit.

[4] The defendant further contends the trial court erred in giving instruction No. 4, on the subject of constructive possession. This contention is also without merit, because the instruction correctly defined constructive possession as a person having dominion and control over the property alleged to be possessed. See *State v. Spillman*, 110 Wash. 662, 188 Pac. 915 (1920); *State v. Parent*, 123 Wash. 624, 212 Pac. 1061 (1923); *State v. Johnson*, 129 Wash. 62, 224 Pac. 602 (1924).

[5] The defendant contends the court erred in failing to give his proposed instructions to the effect that the state must prove that the defendant knew of the existence of any marijuana found in his possession. The law of this state is to the contrary. Mere proof of possession is sufficient, absent a showing by the defendant that his possession was unwitting, authorized by law, acquired in a lawful manner, or otherwise excusable under the statute.

State v. Henker, 50 Wn.2d 809, 314 P.2d 645 (1957); *State v. Mantell*, 71 W.D.2d 756, 430 P.2d 980 (1967).

We are satisfied the defendant received a fair trial in this case. The judgment of conviction on the verdict is affirmed.

FINLEY, C. J., HILL, WEAVER, ROSELLINI, HAMILTON, HALE, and NEILL, JJ., concur.

DONWORTH, J. (dissenting)—In my opinion the majority, in its effort to sustain the validity of the search warrant issued in this case, overlooks the vital issue (alluded to by appellant in his brief, and urged before this court in oral argument) which requires that appellant's conviction be reversed. I, therefore, respectfully dissent.

The requirements for the issuance of search warrants is governed by the fourth amendment to the United States Constitution, which provides, in part, that:

> [N]o warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The fourteenth amendment to the United States Constitution provides, in part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law; . . . .

The Fourth Amendment is applicable to this state through the Fourteenth. *Mapp v. Ohio*, 367 U.S. 643, 6 L.Ed.2d 1081, 81 Sup. Ct. 1684 (1961); *Ker v. California*, 374 U.S. 23, 10 L.Ed.2d 726, 83 Sup. Ct. 1623 (1963).

In addition, article 1, section 7, of the Constitution of Washington provides:

> No person shall be disturbed in his private affairs, or

his home invaded, without authority of law.

It has been held that, although this latter provision differs very slightly in language from the fourth amendment to the United States Constitution, the two provisions are identical in purpose and substance. *State v. Miles,* 29 Wn.2d 921, 190 P.2d 740 (1948); *Seattle v. See,* 67 Wn.2d 475, 408 P.2d 262 (1965), *rev'd on other grounds,* 387 U.S. 541, 18 L.Ed.2d 943, 87 Sup. Ct. 1737 (1967).

In *Aguilar v. Texas,* 378 U.S. 108, 114, 12 L.Ed.2d 723, 84 Sup. Ct. 1509 (1964), the requirements of an application for a search warrant based, as in the present case, upon hearsay information, which are necessary to meet the requirements of the fourth and fourteenth amendments to the United States Constitution, were set forth as follows:

> Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones v. United States,* 362 U.S. 257, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, *and some of the underlying circumstances from which the officer concluded that the informant,* whose identity need not be disclosed, see *Rugendorf v. United States,* 376 U.S. 528, *was "credible" or his information "reliable."*[1] Otherwise, "the inferences from the facts which lead to the complaint" will be drawn not "by a neutral and detached magistrate," as the Constitution requires, but instead, by a police officer "engaged in the often competitive enterprise of ferret-

1. Justice of the Peace Starr testified at the superior court hearing, referred to on page 949 of the majority opinion, as follows: "Q. Well, what did the police tell you that made you believe that she [the informant] was a person entitled to be believed? A. *Nothing.* Q. What did Mr. Stang tell you that made you believe she was entitled to be believed? A. Nothing. I relief [sic] upon my observations." (Italics mine.)

> ing out crime," *Giordenello v. United States, supra* [357 U.S. 480, 12 L.Ed.2d 1503, 78 Sup. Ct. 1245], at 486; *Johnson v. United States, supra,* [333 U.S. 10, 92 L.Ed. 436, 68 Sup. Ct. 367], at 14, or, as in this case, by an unidentified informant. (Footnote omitted.) (Italics mine.)

In this case, the written complaint (set forth in substance in the majority opinion at page 948), when considered alone, clearly fails to state sufficient probable cause for the issuance of a search warrant. The magistrate is not informed thereby of any of the "underlying circumstances from which the officer concluded that the informant . . . was 'credible' or . . . [her] information 'reliable'."[2]

It is only by the consideration of the written complaint, together with the affidavits signed by Detectives Waitt and Fawcett, Justice of the Peace Evangeline Starr, and Deputy Prosecutor Stang, which were prepared after a motion to suppress had been interposed by appellant, that the trial court and this court were and are able to find any semblance of probable cause to support the issuance of the search warrants in this case.

In *Aguilar v. Texas, supra,* the Supreme Court stated, in a footnote at page 109 of the opinion, that:

> It is elementary that in passing on the validity of a warrant, the reviewing court may consider *only* information brought to the magistrate's attention.

Appellant incorrectly contends that such requirement is met only where consideration is limited to the face of the written complaint or affidavit for search warrant.

2. The informant, under oath at the hearing on the motion to suppress, denied having given information to the officers relating to three of the five addresses, and further *denied having any knowledge* at all regarding those three addresses.

This is the net effect of Fed. R. Crim. P. 41, 18 U.S.C.A., which is referred to in the majority opinion at page 955.

Rule 41 provides, in part:

> (c) Issuance and contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant.

It has been held that, under this rule, "affidavit" refers to a sworn statement in *writing*, and that, if sworn information was presented to the commissioner other than that contained in affidavits, such information could not be considered by him or by the reviewing court on motion for the return of property seized and to suppress such property for use as evidence. *United States v. Birrell*, 242 F. Supp. 191 (S.D. N.Y. 1965); *Rosencranz v. United States*, 356 F.2d 310 (1st Cir. 1966); *United States v. Walters*, 193 F.Supp. 788 (W.D. Ark. 1961). I agree, however, that this federal rule of criminal procedure is not applicable to criminal cases in this state, as is correctly pointed out in the majority opinion.

In this state, the magistrate is not limited to the written complaint for search warrant in determining the existence of probable cause. In *Ladd v. Miles*, 171 Wash. 44, 49, 17 P.2d 875 (1932), we said:

> That all the facts going to show probable cause need not be stated in the affidavit or complaint, seems to be established by our own cases of *State ex rel. Hodge v. Gordon*, 95 Wash. 289, 163 Pac. 772; *State v. Voelker*, 137 Wash. 156, 242 Pac. 6, and *State v. Noah*, 150 Wash. 187, 272 Pac. 729; . . . .

And, in *State v. Malbeck*, 69 Wn.2d 695, 419 P.2d 805 (1966), it was held that a signed affidavit for a search warrant was not required, so long as the information

contained in the unsigned document constituting probable cause was stated under oath.

However, even though the issuing magistrate is not limited to a consideration of the written complaint or affidavit under the law in this state (as he would be under Rule 41), but may consider oral testimony and such other evidence as may be presented to him at the time the warrants are sought, the question is whether or not there must be *some* form of *contemporaneous record* made of such evidence.

As appellant points out in his brief, in contending that Rule 41 should be applied:

> The problem created by not requiring a writing is that a "swearing contest" then results as to what occurred before the magistrate.
>
> Since no person is present before the magistrate except the police officer complainant a defendant is faced with a "chamber of mirrors" or "selective remembrance" problem in determining whether the magistrate actually had probable cause to issue the warrant.
>
> The present rule allows the officers seeking the warrant to file affidavits as fast as the defendant can raise omissions thus precluding any appellate regulation of whether the magistrate acted properly in granting the complaint.

Unfortunately, there is a dearth of authority on the question of whether, in the absence of specific statutory requirement of a contemporaneous record or language in a state constitution which requires such a record, due process requires such a record. The reason for such a hiatus is obvious since in the federal courts, and in most states, when the question has arisen, such statutory or constitutional requirement does, in fact, exist.

My research has disclosed no authority in this state specifically requiring or not requiring some contemporaneous record. The question seems one of first impression in this court.

One state, Wisconsin, has considered the question absent specific statutory authority. In *Glodowski v. State*, 196 Wis. 265, 271, 220 N.W. 227 (1928), the Wisconsin Supreme Court stated that:

> It is an anomaly in judicial procedure to attempt to review the judicial act of a magistrate issuing a search warrant upon a record made up wholly or partially by oral testimony taken in the reviewing court long after the search warrant was issued. Judicial action must be reviewed upon the record made at or before the time that the judicial act was performed. The validity of judicial action cannot be made to depend upon the facts recalled by fallible human memory at a time somewhat removed from that when the judicial determination was made. This record of the facts presented to the magistrate need take no particular form. The record may consist of the sworn complaint, of affidavits, or of sworn testimony taken in shorthand and later filed, or of testimony reduced to longhand and filed, or of a combination of all these forms of proof. The form is immaterial. The essential thing is that proof be reduced to permanent form and made a part of the record which may be transmitted to the reviewing court.

Without some such requirement, there is no reliable way that a reviewing court can determine whether the evidence before the magistrate at the time the warrants issued complied with the constitutional requirements as applied in *Mapp v. Ohio, supra, Ker v. California, supra,* and *Aguilar v. Texas, supra.* Such a requirement seems to me to be imperative.

I would note in addition to the above that, even con-

sidering the attempts to recreate the justice court proceedings as valid, the subsequent affidavits introduced, together with the record from the justice court and testimony elicited at the superior court hearing, fail, in my opinion, to establish that a sufficient showing of probable cause was made before the issuing magistrate to justify her issuance of warrant No. 0297.

In *State v. McClung*, 66 Wn.2d 654, 659, 404 P.2d 460 (1965), we quoted with approval from *State v. Bantam*, 163 Wash. 598, 600, 1 P.2d 861 (1931), as follows:

> [M]ere anonymous information, *unsupported by other facts then within the knowledge of the officer or learned by subsequent investigation*, is not of itself sufficient to constitute reasonable and probable cause. (Italics mine.)

See, also, *In re Little v. Rhay*, 68 Wn.2d 353, 357, 413 P.2d 15 (1966).

Turning to the affidavit of the officers, Fawcett and Waitt, which purportedly reflects the information which was presented to the magistrate at the time the search warrants were sought, we find the statement:

> Regarding 5514½ 11th N.E., Seattle, Washington, your affiants advised that this was the residence of Irving Walcott, a partner in the Eigerwand Coffee House in the University District where many of the suspected drug users in the University District congregate; that Walcott and the Eigerwand had been suspected as a source of marihuana and dangerous drugs in the District since March of 1965 when it came to the attention of the Seattle Police Department from informants that both were involved.

I cannot agree with the majority that this information, if given to the magistrate at the time the warrants issued, fulfills the second requirement of *Aguilar, supra*.

Certainly, the fact that a man's place of business if frequented by *suspected* drug users cannot constitute corroboration for information from an otherwise untested and unknown informant, sufficient to fulfill the constitutional requirements of *Aguilar, supra,* and to justify the issuance of a search warrant authorizing an invasion of that man's home. Such would constitute a flagrant application of the odious doctrine of "guilt by association."

Secondly, no basis is given for the police suspicion that appellant and the Eigerwand Coffee House were a source of marijuana and dangerous drugs other than that, in March, 1965, the police received some unspecified information "from informants that both were involved." Such informants are not identified, nor do the officers even allege that they were "reliable."

It is not sufficient that the officers do not refer to informants as "untested or unreliable" (see majority opinion, page 954), but rather it is necessary that the state establish the informant's reliability. *Aguilar v. Texas, supra.*

Finally, the statement in the majority opinion that "the magistrate's affidavit conclusively shows that she was told by the officers that *these* [italics mine] informants *were* reliable," is simply incorrect.

During the hearing in superior court, referred to on page 949 of the majority opinion, Justice of the Peace Starr testified as follows:

> Q. They [the officers] talked about other informants with respect to that address [5514½ 11th N.E.]? A. I couldn't say if they did.

And later during the same hearing she testified as fol-

lows:

> Q. . . . Did the officers tell you who those informants were, these informants of March, 1965? A. No. Q. They didn't tell you, Did they tell you anything about these informants? Did they tell you their age, whether they were narcotics users themselves? A. I am sure they didn't. I mean, that is my recollection. Q. Based upon your recollection can you tell me anything about those informants? A. They may have given some information about those informants. Q. What information was that? A. I can't recall. Q. So for the purposes here today you can't remember any information given to you about those informants. If I were to ask you to describe those informants, and tell me about those informants, you would have to say I don't know? A. If you would refresh my recollection I probably would recall. Q. I can't refresh your recollection for the simple reason I wasn't present there this day and there was no record kept and this is one of the problems that we have here.

At the time the detectives appeared before Justice of the Peace Starr, five separate complaints were presented, upon the basis of which five separate search warrants were sought by the officers, one for each of five separate addresses. We are concerned with only one of those addresses in this case, 5514½ - 11th N.E., where appellant Walcott resided.

The statement contained in the portion of the magistrate's affidavit quoted in the majority opinion at page 954 does not relate to 5514½ - 11th N.E., nor to any specific address.[3]

3. If the magistrate's statement can be rationally construed to relate to any specific address, it must necessarily (if it is to be read consistent with the version offered in the affidavits of the police officers) relate to 2303 N.E. 65th and 4243 11th N.E. Regarding these two addresses, the officers assert in their affidavit that information was received from "reliable" informants. See majority opinion, page 952. There is simply no basis for contending that it related specifically to 5514½ 11th N.E., let alone that it "conclusively" establishes that information as to that specific address came from "reliable" informants.

I am unable to find in the record any support for the assertion in the majority opinion that the magistrate's affidavit "conclusively" shows that she was told by the officers that the informants of March, 1965 were reliable.

In summary, the written complaint for search warrant No. 0297, considered alone, was insufficient to justify the issuance of the search warrant in question. The insufficient, written complaints, together with the warrants themselves and the return thereon, constituted the entire record of the evidence which was before the issuing magistrate. The state contends that the record could have reflected more, but the fact remains that it did not.

Two months after the warrants were issued and the dwelling house of appellant was invaded and searched by the police and evidence was seized upon which the conviction of appellant is based, motions to suppress were interposed by appellant. The state then, for the first time, sought to "fill the gaps" in the insufficient, written record made before the magistrate, with affidavits based upon affiant's memory of what had occurred at the time the search warrants were issued. The consideration of these subsequent affidavits by the trial court, and the consequent denial of appellant's motion to suppress, in my opinion, constituted a denial of due process requiring a reversal of appellant's conviction.

However, even if the anomaly proposed by the majority opinion is to now be adopted as the rule in this state, it is clear, from the recreated record of the proceedings before the issuing magistrate, that there was not a showing of probable cause sufficient to satisfy the constitutional standards set forth by the United States

Supreme Court in *Aguilar, supra,* at the time the warrants issued. No credible basis was presented for the officers' reliance on the word of the anonymous informant.

The warrant having been improperly issued, the conviction of appellant, which rests on the evidence unlawfully seized pursuant thereto, must be reversed, and appellant's sentence vacated. I would so order.

APPENDIX C

IN JUSTICE'S COURT BEFORE
EVANGELINE STARR, JUDGE, JUSTICE OF THE
PEACE IN AND FOR SEATTLE DISTRICT,
KING COUNTY, WASHINGTON

COMPLAINT FOR SEARCH WARRANT

No. 0293

STATE OF WASHINGTON }
COUNTY OF KING } ss.

COMES NOW R. W. Waitt, SPD, who, being first duly sworn on oath complains, deposes and says:

That he has probable cause to believe and in fact does believe that, in violation of the laws of the state of Washington, narcotic drugs as defined by law are being used, manufactured, sold, bartered, exchanged, given away, furnished or otherwise disposed of or kept, in, about and upon certain premises within King County, Washington, designated and described as follows, to-wit:

102 Broadway East, in the City of Seattle,

that affiiant's belief is based upon the following facts and circumstances: Informant saw marihuana in the upstairs apartment yesterday. Saw people known to use narcotics coming in and out and smoking marihuana in the apartment.

R. W. Waitt

SUBSCRIBED and SWORN to before me this 5th day of November, 1965.

EVANGELINE STARR

Judge, Seattle District,
King County, Washington

RECEIVING OF COMPLAINT AND
ISSUANCE OF WARRANT APPROVED:

CHARLES O. CARROLL
Prosecuting Attorney

By THOMAS A. STANG
Deputy Prosecuting Attorney

IN JUSTICE'S COURT BEFORE
EVANGELINE STARR, JUDGE, JUSTICE OF THE
PEACE IN AND FOR SEATTLE DISTRICT,
KING COUNTY, WASHINGTON

COMPLAINT FOR SEARCH WARRANT

No. 0294

STATE OF WASHINGTON }
COUNTY OF KING } ss.

COMES NOW R. W. Waitt, SPD, who, being first duly sworn on oath complains, deposes and says:

That he has probable cause to believe and in fact does believe that, in violation of the laws of the state of Washington, narcotic drugs as defined by law are being used, manufactured, sold, bartered, exchanged, given away, furnished or otherwise disposed of or kept, in, about and upon certain premises within King County, Washington, designated and described as follows, to-wit:

3818-4th Avenue N.E., in the City of Seattle,

that affiant's belief is based upon the following facts and circumstances: Informant who was present when the drugs, 600 capsules of LSD, were purchased in Berkeley, California and was brought to Seattle. Informant saw the LSD and marihuana at the above address there this date.

R. W. Waitt

SUBSCRIBED and SWORN to before me this 5th day of November, 1965.

EVANGELINE STARR

Judge, Seattle District,
King County, Washington

RECEIVING OF COMPLAINT AND
ISSUANCE OF WARRANT APPROVED:

CHARLES O. CARROLL
Prosecuting Attorney

By THOMAS A. STANG
Deputy Prosecuting Attorney

A-32

IN JUSTICE'S COURT BEFORE
EVANGELINE STARR, JUDGE, JUSTICE OF THE
PEACE IN AND FOR SEATTLE DISTRICT,
KING COUNTY, WASHINGTON

COMPLAINT FOR SEARCH WARRANT

No. 0295

STATE OF WASHINGTON }
COUNTY OF KING } ss.

COMES NOW R. W. Waitt, SPD, who, being first duly sworn on oath complains, deposes and says:

That he has probable cause to believe and in fact does believe that, in violation of the laws of the state of Washington, narcotic drugs as defined by law are being used, manufactured, sold, bartered, exchanged, given away, furnished or otherwise disposed of or kept, in, about and upon certain premises within King County, Washington, designated and described as follows, to-wit:

4243-11th Avenue N.E., in the City of Seattle,

that affiant's belief is based upon the following facts and circumstances: Informant saw marihuana at the above address at various times and has been told that the occupant there, Paul Davis, is selling marihuana. This confirms reports that the undersigned has received from various other informants.

R. W. Waitt

SUBSCRIBED and SWORN to before me this 5th day of November, 1965.

EVANGELINE STARR

Judge, Seattle District,
King County, Washington

RECEIVING OF COMPLAINT AND
ISSUANCE OF WARRANT APPROVED:

CHARLES O. CARROLL
Prosecuting Attorney

By THOMAS A. STANG
Deputy Prosecuting Attorney

IN JUSTICE'S COURT BEFORE
EVANGELINE STARR, JUDGE, JUSTICE OF THE
PEACE IN AND FOR SEATTLE DISTRICT,
KING COUNTY, WASHINGTON

COMPLAINT FOR SEARCH WARRANT

No. 0296

STATE OF WASHINGTON }
COUNTY OF KING } ss.

COMES NOW R. W. Waitt, SPD, who, being first duly sworn on oath complains, deposes and says:

That he has probable cause to believe and in fact does believe that, in violation of the laws of the state of Washington, narcotic drugs as defined by law are being used, manufactured, sold, bartered, exchanged, given away, furnished or otherwise disposed of or kept, in, about and upon certain premises within King County, Washington, designated and described as follows, to-wit:

2303 N.E. 65th, in the City of Seattle,

that affiant's belief is based upon the following facts and circumstances: Informant saw LSD and marihuana in the residence yesterday.

R. W. Waitt

SUBSCRIBED and SWORN to before me this 5th day of November, 1965.

EVANGELINE STARR

Judge, Seattle District,
King County, Washington

RECEIVING OF COMPLAINT AND
ISSUANCE OF WARRANT APPROVED:

CHARLES O. CARROLL
Prosecuting Attorney

By THOMAS A. STANG
Deputy Prosecuting Attorney

IN JUSTICE'S COURT BEFORE
EVANGELINE STARR, JUDGE, JUSTICE OF THE
PEACE IN AND FOR SEATTLE DISTRICT,
KING COUNTY, WASHINGTON

COMPLAINT FOR SEARCH WARRANT

No. 0297

STATE OF WASHINGTON }
COUNTY OF KING } ss.

COMES NOW R. W. Waitt, SPD, who, being first duly sworn on oath complains, deposes and says:

That he has probable cause to believe and in fact does believe that, in violation of the laws of the state of Washington, narcotic drugs as defined by law are being used, manufactured, sold, bartered, exchanged, given away, furnished or otherwise disposed of or kept, in, about and upon certain premises within King County, Washington, designated and described as follows, to-wit:

5514½-11th Avenue N.E., in the City of Seattle,

that affiant's belief is based upon the following facts and circumstances: Received information from informant who was present when the marihuana was purchased in Mexico and brought to Seattle. Informant was present when the marihuana was brought to the house and has seen the marihuana in the house this date.

R. W. Waitt

SUBSCRIBED and SWORN to before me this 5th day of November, 1965.

EVANGELINE STARR
Judge, Seattle District,
King County, Washington

RECEIVING OF COMPLAINT AND
ISSUANCE OF WARRANT APPROVED:

CHARLES O. CARROLL
Prosecuting Attorney

By THOMAS A. STANG
Deputy Prosecuting Attorney

APPENDIX D

STATE OF WASHINGTON }
COUNTY OF KING } ss.

EVANGELINE STARR, being first duly sworn on oath deposes and says:

That she is a Justice of the Peace for the Seattle District Justice Court;

That on the 5th day of November, 1965, she was asked by the Seattle Police Department and the King County Prosecutor's Office to issue search warrants for the following addresses located in Seattle, King County, Washington: 5514½-11th Avenue N.E., 102 Broadway East, 2303 N.E. 65th, 4243-11th Ave. N.E. and 3818-4th Avenue N.E.;

That present at the time were Detectives A. W. Fawcett and R. W. Waitt of the Seattle Police Department, Narcotics Detail, as well as Thomas A. Stang, Assistant Chief Criminal Deputy. There was also another person present who was identified as the informant referred to in each of the affidavits filed with the court;

That prior to the issuance of the search warrants both Detective A. W. Fawcett and Detective R. W. Waitt were sworn on oath and gave testimony under the questioning of Mr. Stang and the undersigned; that the testimony elicited revealed that the informant was present when a large quantity of marihuana was purchased in Mexico; that the purchasers then proceeded by airplane to California, specifically the Berkeley area where some of the marihuana was left and about 600 capsules of a drug commonly known as LSD was purchased; that the party then came to the Seattle area with marihuana and that most of this marihuana was presently in a suitcase at 5514½-11th Avenue N.E.; that the informant on the 4th day of November, 1965, had visited all the above addresses mentioned and seen quantities of marihuana at each of the places as well as drugs classified as dangerous drugs; that the detectives were asked specifically what information the Seattle Police Department Narcotics Detail had about each of the above listed addresses. As the warrants were each individually considered, the detec-

tives explained who lived at the premises and who was seen entering and leaving the premises during the recent weeks; that although your affiant cannot remember specifically any names, the police reported that these were the same persons that the department had had trouble with in the University District Area of Seattle and each of them has been suspected of dealing with and using narcotic drugs; that the department had received reliable information from other reliable informants that these persons were involved in the unlawful drug activity in the university area;

Your affiant was introduced to the informant, although the name was withheld, and although not put under oath the informant was asked whether or not the informant had seen narcotics, specifically marihuana at the above addresses as per the statements of the detectives in their affidavits; that the informant replied, "yes;"

That there were no notes taken during this interrogation of the officers and the informant;

That based upon the above information your affiant felt that there was probable cause to believe that there were various quantities of illegal narcotics at the above addresses and thereafter issued the above-mentioned search warrants.

s/EVANGELINE STARR

Subscribed and sworn to before me this 23 day of December, 1965.

s/THOMAS A. STANG

NOTARY PUBLIC in and for the State of Washington, residing at Seattle.

STATE OF WASHINGTON } ss.
COUNTY OF KING }

THOMAS A. STANG, being first duly sworn, upon oath deposes and says:

That he is Assistant Chief Criminal Deputy Prosecuting Attorney for King County, State of Washington;

That in the late afternoon of November 5, 1965 he was contacted by Detectives R. W. Waitt and A. L. Faw-

cett of the Seattle Police Department, Narcotics Detail, who asked his assistance in obtaining search warrants for Narcotics Drugs and Dangerous Drugs at five different addresses in Seattle, to-wit: 2303 N.E. 65th, Seattle, Washington; 4243 11th Avenue N.E., Seattle, Washington; 3818 4th Avenue N.E., Seattle, Washington; 5514½ 11th Avenue N.E., Seattle, Washington; and 102 Broadway East, Seattle, Washington;

That the detectives advised that an informant had come to their office and advised them that the informant had seen various types of dangerous drugs and marihuana at the above addresses the previous day, November 4, 1965; that your affiant asked the officers to come to the Prosecutor's office with the informant and that your affiant would attempt to obtain the desired search warrants; that your affiant personally interviewed the informant and the officers, and then felt that an application for a search warrant should be made; that at this time it was nearing 4:30 p.m., the time that the Courts usually close; that your affiant contacted the Seattle District Justice Court and asked if there would be a judge available to consider the applications for search warrants after 4:30 p.m. and your affiant was advised that Justice of the Peace Evangeline Starr would wait for us to bring the applications down; that the applications were prepared as quickly as possible and submitted to Judge Starr around 4:45 p.m. that afternoon;

That prior to signing the complaint and search warrant, Judge Starr put both A. L. Fawcett and R. W. Waitt under oath and had them relate in detail what information they had, in addition to that stated on each complaint, regarding each of the above addresses and the occupants of each address; that some of the testimony was given in narrative form and some of the testimony was elicited through the questioning of your affiant; that at this time the informant was also present and was introduced to Judge Starr as the informant referred to in each of the complaints although the informant's name was withheld as per promises made to the informant by the detectives and your affiant; that Judge Starr asked the informant whether or not the information related to her by the

detectives in each complaint was true and the informant replied that it was true and accurate; that your affiant does not remember the exact details of what the detectives told Judge Starr regarding each of the addresses other than the fact that each of the known occupants of the residences listed had come up as a suspected marihuana and LSD-25 user during their recent investigations of the narcotics problem in the University area of Seattle;

Your affiant further says that this method of obtaining the search warrant was used to expedite the procedure due to the fact that there was a judge as well as clerks of the court waiting to assist in obtaining the warrants; that it is further customary for an issuing judge, in addition to considering the complaint signed under oath before him, to put the requesting officer under oath and inquire of him in more detail regarding the circumstances to justify the issuance of the search warrant.

That at the conclusion of the hearing, Judge Starr issued search warrants for the above mentioned addresses which were turned over to the officers to serve.

s/THOMAS A. STANG

Subscribed and sworn to before me this 23 day of December, 1965.

s/RUTH ELY

NOTARY PUBLIC in and for the State of Washington, residing at Seattle.

STATE OF WASHINGTON, }
COUNTY OF KING } ss:

Detectives R. W. WAITT and A. L. FAWCETT, being each first duly sworn upon oath, depose and say:

That they are officers of the Seattle Police Department assigned to the Narcotics Detail;

That on November 5, 1965 in the afternoon, a person came into the Narcotics Detail office and stated that this individual had some information to give us regarding the location of narcotics, LSD-25 and marihuana, in the University District in Seattle; that the informant was inter-

viewed by both your affiants; that your affiants, after the interview contacted Deputy Prosecutor Thomas A. Stang for assistance in obtaining search warrants for the places mentioned by the informant; that Detective Fawcett went out with the informant to check the addresses of each of the places mentioned by the informant; that when Detective Fawcett and the informant returned, all went to the prosecutor's office to discuss getting a search warrant; that after a discussion, the complaints were prepared and Deputy Stang, together with the informant and your affiants, went to Judge Starr's Court to ask for the search warrant;

That your affiants were put under oath and Detective R. W. Waitt signed the various complaints; that your affiants then explained to Judge Starr what additional information your affiants knew about each of the addresses as follows:

Regarding 2303 N.E. 65th, Seattle, Washington, your affiants stated that this was the residence of Al Moss who had been suspected to be trafficking in dangerous drugs and narcotic drugs; that this information was obtained from reliable informants; that the house had been observed on previous occasions and suspected users of narcotics had been seen entering and leaving the premises;

Regarding 4243 11th N.E., Seattle, Washington, your affiants advised that the house was occupied by Paul Davis; that your affiants had received information from other reliable informants that Paul Davis was trafficking in narcotic and dangerous drugs; that Paul Davis drove a Meteor Hearse and was using his Hearse to carry narcotics;

Regarding 5514½ 11th N.E., Seattle, Washington, your affiants advised that this was the residence of Irving Walcott, a partner in the Eigerwand Coffee House in the University District where many of the suspected drug users in the University District congregate; that Walcott and the Eigerwand had been suspected as a source of marihuana and dangerous drugs in the District since March of 1965 when it came to the attention of the Seattle Police Department from informants that both were involved;

Regarding 3818-4th N.E., Seattle, Washington, your affiants advised that one of the residents at this address was Peter Christofferson who had previously been arrested on suspicion of a narcotics offense involving marihuana, although not charged; that officers had observed suspected narcotics users in the past month entering and leaving the premises;

That Judge Starr was introduced to the informant, although the name was withheld and Judge Starr asked the informant whether the statements made by the officers were true and whether or not this individual was the informant referred to in the affidavits of R. W. Waitt and the informant responded yes to both questions. Judge Starr then asked the informant whether or not the information that the informant gave the police officers was true and the informant replied that it was;

That Judge Starr then signed and turned over the Search Warrants to your affiants to be served; that at this time it was after 5:00 p.m.

s/R.W. WAITT
s/A. L. FAWCETT

Subscribed and sworn to each before me this 23 day of December, 1965.

THOMAS A. STANG

NOTARY PUBLIC in and for the State of Washington, residing at Seattle.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 651

PETER AANDAHL CHRISTOFFERSON, PAUL HOWARD DAVIS, CHRISTOPHER JOHN HAWKINS, JOYCE EDNA CHAKOS and PETER MICHAEL CHAKOS,
Petitioners,

v.

THE STATE OF WASHINGTON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Washington

BRIEF OF RESPONDENT IN OPPOSITION

CHARLES O. CARROLL
King County Prosecuting Attorney
JAMES E. KENNEDY
Chief Civil Deputy
JERRY BRIAN RIESS
Deputy Prosecuting Attorney
Attorneys for Respondent

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IN THE

Supreme Court of the United States

October Term, 1968

No. .....

PETER AANDAHL CHRISTOFFERSON, PAUL HOWARD DAVIS, CHRISTOPHER JOHN HAWKINS, JOYCE EDNA CHAKOS and PETER MICHAEL CHAKOS,
Petitioners,

v.

THE STATE OF WASHINGTON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Washington

BRIEF OF RESPONDENT IN OPPOSITION

CITATION TO OPINION BELOW

The opinion of the Washington State Supreme Court is reported in 74 W.D.2d 156 (1968), a copy of which is set forth as appendix A to the petition.

The opinion of the Washington State Supreme Court appealed from herein incorporates by reference the opinion in *The State of Washington v. Irving James Walcott*, 72 W.D.2d 947 (1968), a copy of which is attached to the petition as appendix B.

JURISDICTION

The jurisdictional requirements are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Do the fourth and fourteenth amendments to the United States Constitution require that a contemporaneous record be made as to proceedings attendant to issuance of a search warrant by a Justice of the Peace where said warrant is issued upon probable cause supported by oath or affirmation and all parties to said issuance proceedings are subject to full examination on sworn testimony as to its issuance?

2. Was there sufficient probable cause shown as regards each petitioner for the issuance of the search warrants as required by the fourth and fourteenth amendments to the United States Constitution?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The applicable statutes and constitutional provisions are adequately set forth in the petition.

STATEMENT

About 10:00 a.m. of November 5, 1965, Detective Allan L. Fawcett of the Seattle Police Department Narcotics Detail received a telephone call from an anonymous informant, asking if he desired specific information concerning narcotics in the University District of Seattle (R-Chakos 171). The informant stated that her boy friend was involved in the LSD and marijuana situation and she wanted to help the police eliminate the problem.

Detective Fawcett told the female informant that he desired to have the information but that it would be necessary for her to possibly go to court. She agreed to this and suggested a meeting place at the Cowan Park Bridge area of Seattle. Later the same day, Detective Fawcett met with the informant, a Larissa Hrishko (R-Chakos 172), and after a brief conversation she agreed to come down to police headquarters to talk further (R-Chakos 173). Detective Robert W. Waitt joined them on the way to the police department. At about 2:30, Detectives Fawcett, Waitt and Sprinkle interviewed the informant for thirty to forty-five minutes in the Narcotics Department (R-Chakos 174). She told the detectives that she had just arrived in Seattle on November 4th and had visited six places since her arrival here; she herself had seen drugs and knew that there was marijuana, LSD and so forth kept (R-Chakos 174). She didn't know the exact addresses but following the conversation, she directed Detective Fawcett in his car to each of five houses and at each house described to him the type of narcotic and whether she had seen it the day before or that very morning (R-Chakos 177). She described each individual premises as to the entry way and the general layout of rooms with the exception of the Al Moss house (R-Chakos 179).

Upon return to the police department, the detectives and informant proceeded to the King County Prosecutor's office and talked to assistant chief deputy prosecutor Thomas Stang. The informant was introduced to Mr. Stang and he conducted an interview of her in the presence of both Detectives Fawcett and Waitt. The informant told the prosecutor that she wanted to help

because her boy friend had gotten involved in this and she wanted to stop the narcotics in the University District (R-Chakos 149). Mr. Stang directly asked her if she had been at each of the five addresses and what she had seen. The question arose due to his amazement or curiosity at her having visited at least five different addresses in less than two days (R-Chakos 150). In response, the informant related the same information she had given the detectives earlier. This was that she had been in Mexico when a large quantity of marijuana had been purchased by the residents of one of these houses. That she came back to Seattle with this individual and that they had stopped off at Berkeley on the way to trade or purchase 600 capsules of LSD (R-Chakos 151). That she had arrived in Seattle on November 4th and had been to the five addresses visiting friends and observing drugs and marijuana being used at each place within the past 36 hours (R-Chakos 151).

The detectives told Mr. Stang that this information coincided with information that they had uncovered in their recent investigation of University area narcotics use and that the informant had pointed out the houses she had visited so as to ascertain correct addresses and verify the information with other police department sources.

Complaints were then prepared for search warrants and at approximately 5:00 o'clock in the afternoon of the same day, King County Deputy Prosecuting Attorney Thomas A. Stang filed the five complaints for search warrants in the Seattle District Justice Court of magistrate Evangeline Starr. Seattle police detectives R. W. Waitt and A. L. Fawcett were present at this time along

with the informant. The written complaints for search warrants were presented to Judge Starr and Detective R. W. Waitt who was to sign them was put under oath (Appendix D R-Chakos 22:13, 36:12). Detective Fawcett was also sworn during these proceedings and gave testimony. These requests for search warrants were each considered separately in *seratum* (R-Chakos 25:8, 40:12). It is apparent from the record that the informant referred to in each complaint was the girl who was present and identified only as the informant. She was asked whether she was the informant and whether what she told the officers in relation to each of the complaints was true (D, R-Chakos 25:10; App. D). She replied that it was. Judge Starr learned that the information given by the informant had been very recently supplied (D, R-Chakos 24:19) and that prior to receiving this information the Seattle Police Department had been investigating these very same addresses for suspected narcotics violations (D, R-Chakos 24:13). The police officers did not disclose the informant's name to Judge Starr, and the State did not elect to have her testify under oath. The informant was not previously known to the officers and they had had no past experience with her. However, the officers testified under oath as to their testing of the reliability of her statements concerning the information furnished. The court questioned the informant as to the truth of statements she made and the officers and she affirmed the statements. The information obtained from the informant by the officers and related to Judge Starr was as follows: that the informant was present when marijuana was purchased in Mexico (D, R-Chakos 34) and from there had proceeded to Berkeley,

California, where 600 capsules of LSD were purchased (D, R-Chakos 48:13). That the informant then came to Seattle (D, R-Chakos 28, 34) and the bulk of the marijuana was currently in a suitcase at 5514-½ 11th Avenue N.E., Seattle (App. D); that on the 4th day of November, 1965 the informant had been in the upstairs apartment, 102 Broadway East, and had seen people known by the informant to use narcotics and had seen them smoking marijuana in the apartment on that date; that the informant had been at 3818 Fourth Avenue N.E. on the 5th day of November, 1965 and had seen marijuana and LSD there at that time (D, R-Chakos 28); that she had been at 4243 11th Avenue N.E. on the 4th day of November, 1965 and had also seen marijuana there at that time (App. D); that she had seen marijuana at 4243 11th Avenue N.E. at various other times, and had been told that the occupant there, Paul Davis, is selling marijuana (D, R-Chakos 30); that she was at the residence at 2303 N.E. 65th on November 4, 1965 and while there saw both marijuana and LSD; finally, that she was at 5514-½ 11th Avenue on November 5th and had seen marijuana while there (D, R-Chakos 34).

In addition, Officers Waitt and Fawcett testified under oath before Judge Starr as to facts that they had obtained through independent investigations prior to receiving information from the current informant; as to 120 Broadway East, it is not specified; as to 3818 Fourth Avenue N.E., Judge Starr was advised that:

> one of the residents at this address was Peter Christofferson who has previously been arrested on suspicion of a narcotics offense involving marijuana, although not charged; that officers had observed

> suspected narcotics users in the past month entering and leaving the premises (App. D)

and that the surveillance was made by or at the request of Detective Waitt or Fawcett (D, R-Chakos 38:3, 38:12; 77:18, 77:8, 78:23); as to 4213 11th Avenue N.E., Judge Starr was advised by detectives that

> the house was occupied by Paul Davis; that the detectives had received information from other reliable informants that Paul Davis was trafficking in narcotic and dangerous drugs; that Paul Davis drove a Meteor Hearse and was using the hearse to carry narcotics; (App. D)

that the address had been verified by Detective Fawcett (D, R-Chakos 74-76, 35-36); as to the address at 2303 N.E. 65th, Judge Starr was advised by the detectives that:

> this was the residence of Al Moss who had been suspected to be trafficking in dangerous drugs and narcotic drugs; that this information was obtained by reliable informants; that the house had been observed on previous occasions and that suspected users of narcotics had been seen entering and leaving the premises (App. D).

This statement is confirmed by the testimony (D, R-Chakos 30:21, 30:30, 31:7, 31:14; C., 66 to 71); as to 5514-½ 11th Avenue N.E., Judge Starr was advised by the detectives

> that this was the residence of Irving Walcott, a partner in the Figerwand Coffee House in the University District congregate; that Walcott and the Eigerwand had been suspected as a source of marijuana and dangerous drugs in the District since March of 1965, when it came to the attention of the Seattle Police Department from informants that both were involved; (App. D).

This statement is confirmed by the testimony (D, R-Chakos 38-51, 86, 87).

Judge Starr, in discussing the testimony which was given orally at the time the search warrants were requested, stated several times that a great deal of testimony was taken (D, R-Chakos 33:22, 35:22, 40:24). The estimated time taken by Judge Starr in considering these requests vary from not less than 15 minutes to a maximum of 45 minutes (D, R-Chakos 36:22, 39:13, 79:13, 90:30).

Judge Starr was satisfied that the written complaints, considered together with the oral sworn testimony, gave her probable cause to believe that marijuana was located at the addresses specified in the requests and she issued the search warrants (D, R-Chakos 34:17).

In view of the fact that no written record was made of the hearing before the magistrate, affidavits of magistrate Starr, Deputy Prosecuting Attorney Stang and detectives Waitt and Fawcett were later obtained. These affidavits relate what occurred at the hearing on probable cause for issuance of the search warrants and are attached as Appendix D to the petition. They were considered on the motion to suppress evidence. A special hearing was then ordered by the trial judge in order to provide persons arrested in the aftermath of the searches an opportunity to examine the magistrate, the deputy prosecuting attorney and the detectives as to the contents of the affidavits and the proceedings before the magistrate. At this special hearing, the magistrate and the two detectives were examined and this testimony was transcribed. On February 3, 1966, based upon the affidavits and the transcript of the special hearing, the de-

fendant's motion to suppress the evidence was denied.

All appellants were arrested on November 5, 1965 at a total of three different locations in Seattle and convictions were obtained in each instance, based on evidence seized pursuant to the five search warrants.

REASONS FOR DENYING THE WRIT AS TO QUESTION ONE

I. Contemporaneous Record In Justice Court

A. No Substantial Question Is Raised

Petitioner complains in effect of the failure of Seattle District Justice Court magistrate Evangeline Starr's not transcribing the proceedings surrounding issuance of a search warrant. The complaint fails to note that the search warrant was issued after sworn testimony under oath by two police officers and confirmation by an informant present at the proceedings that narcotics did in fact remain in the possession of numerous individuals at the addresses visited that morning and preceding day by the informant. The testimony indicated where the narcotics were obtained, how they were transported to the place in question, and for what purposes they were being maintained. Further, the testimony indicated confirmation of the informant's disclosures by independent investigation by the officers present before magistrate Starr. The conclusion is inescapable that the five search warrants were issued upon probable cause supported by oath or affirmation as required by the fourth and fourteenth amendments to the United States Constitution.

That the proceeding before Judge Starr was not transcribed contemporaneously does not in any fashion in-

trude upon its validity in supporting the issued search warrants. The constitutional and legislative requirement is that said warrants issue upon probable cause supported by oath or affirmation. The record is clear that such standard was met.

In order to afford petitioners every opportunity to test the constitutionality of the proceedings and evaluate whether or not probable cause existed, the Superior Court required affidavits as to those underlying proceedings. Once the affidavits were presented demonstrating that probable cause was shown for issuance of the search warrants, the Superior Court judge denied petitioners' motion to suppress the evidence seized but preserved an opportunity for renewal of said motion upon completion of a Superior Court hearing as to the prior justice court proceeding, thereby affording petitioners an opportunity to examine Judge Starr, officers Waitt and Fawcett of the Seattle Police Department, and deputy prosecuting attorney Thomas Stang. Following invoking of the hearing opportunity, petitioners renewed their motion to suppress, and the Superior Court once again found the search warrants were issued upon probable cause supported by oath or affirmation, pursuant to statutory and constitutional requirements.

An additional hearing was held just prior to the trial at which the informant Larissa Hrishko, then married to defendant-petitioner Hrishko, testified. The court again denied the motion to suppress.

The evidence having overwhelmingly demonstrated that magistrate Starr properly issued the search warrants, and petitioners having been generously afforded sworn

affidavits as to the proceedings, testimony under oath and with full cross-examination extended as to those proceedings, as well as interrogation during trial as to those proceedings, no substantial question arises of importance to other litigants concerning whether or not the Seattle District Justice Court proceedings had to be contemporaneously transcribed.

B. There Is No Conflict In Decisions Needing Clarification

There are no reported cases that have come to the attention of respondent holding other than that a search warrant must be issued only upon a showing of probable cause based upon or supported by oath or affirmation. Since this is the foundation inquiry of petitioners' sought writ, and, since the principle is well established beyond controversy that the constitutional and statutory requirement is probable cause supported by oath or affirmation, there is no true question needing response or clarification, present a showing that probable cause was established before magistrate Starr.

C. A Full Disclosure of the Justice Court Proceedings Has Been Afforded Petitioner In Re Search Warrant Hearing

Even if it be required to fully disclose what occurred at the proceedings in justice court preliminary to issuance of the search warrants, this in effect has already been done through the affidavits and Superior Court hearings. The same effect has been attained as would be accomplished by a contemporaneous record with the additional safeguard being afforded petitioners of allowing cross-examination of all parties present during those

proceedings as to what occurred. Therefore, nothing would be gained by review as to a contemporaneous record being required in justice court search warrant proceedings.

D. Procedure Below Was Fully in Accord with Constitutional Principles and Statutory Requirements

The fourth and fourteenth amendments are clear and concise on their requirements that searches be based upon warrants issued as the result of probable cause being shown to a committing magistrate, based upon oath or affirmation. Not all judicial proceedings are amenable to full transcription and this would be especially true wherein informants are presented in person before a magistrate.

REASONS FOR DENYING THE WRIT AS TO QUESTION TWO

II. Probable Cause Was Shown for Issuance of the Search Warrants

A. The evidence given before Magistrate Starr included in general:

(1) Presence of the informant who affirmed the information related by the detectives;

(2) Sworn testimony by the detectives that the assertion by the informant coincided with information they had from other informants who were known to be reliable;

(3) Sworn testimony by the detectives that the information coincided with their own investigation and surveillances;

(4) A narrative under oath to the effect that the informant was present in Mexico when the narcotics were purchased; informant traveled to Berkeley where additional drugs were acquired (600 LSD

capsules); informant accompanied the party with the drugs and narcotics to Seattle, arriving November 4th; and informant had seen drugs and/or narcotics in each of the five addresses the day before or morning of the hearing.

B. The evidence given before Magistrate Starr included specifically:

In re 5514-½ 11th Avenue N.E., Seattle;

The informant had seen the bulk of the marijuana purchases in Mexico still in a suitcase at that address this morning;

That the detectives knew this as the address where many suspected drug users congregate and had been suspected as the source of drugs since March, 1965.

In re 102 Broadway East

informant had seen people smoking marijuana on this date in the house and that its occupants were known users;

In re 3818 4th Avenue N.E.

informant had been in the house this date and seen marijuana and LSD at that time; that the detectives knew one of the residents was Peter Christofferson who has previously been arrested on suspicion of a narcotics offense involving marijuana, and that officers had observed suspected users frequenting the place for the last month.

In re 4243 11th Avenue N.E.

informant had seen marijuana there on the day before and at various other times and that informant knew Paul Davis, the occupant, as a vendor of marijuana;

the detectives testified further that the house was occupied by Paul Davis whom other reliable in-

formants stated was trafficking in narcotics and dangerous drugs, using a Meteor hearse to carry the narcotics;

In re 2303 N.E. 65th

that informant visited the residence the day before and saw both LSD and marijuana there; The detectives testified that this was the residence of Al Moss, who had been suspected of trafficking in dangerous drugs and narcotics and was so identified to the detectives by reliable informants;

that the house had been visited by suspected users of narcotics as ascertained by surveillance.

The hearing before Judge Starr lasted from 15 to 45 minutes and concluded with issuance of the five search warrants after Magistrate Starr was satisfied that the written complaints coupled with the sworn oral testimony gave her probable cause to believe that narcotics and/or dangerous drugs were located at the addresses specified.

All five defendant petitioners were arrested as a result of these search warrants. The search warrants were obviously issued upon well-founded probable cause.

A signed affidavit for a search warrant is not required. The fourth amendment to the United States Constitution requires only that warrants issue upon probable cause supported by oath or affirmation.

Petitioner argues that, while courts have generally permitted the issuance of search warrants on the basis of hearsay statements of undisclosed informants, this violates the fourth amendment of the United States Constitution, and that the requirement of oath or affirmation is not fulfilled by hearsay only, and cites *Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed.2d 723, 84 Sup. Ct. 1509 (1964).

Aguilar does not contain such a sweeping indictment of the use of hearsay and is distinguishable from the instant case.

In *Aguilar*, the affidavit for search warrant stated: "Affiants have received reliable information from a credible person and do believe that heroin . . . are being kept at the above-described premises. . . ." The facts which the informant had stated to the officer were not set forth in the affidavit. The following language from *Aguilar* is significant, page 113:

> Here the "mere conclusion" that petitioner possessed narcotics was not even that of the affiant himself; it was that of an unidentified informant. The affidavit here not only "contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein," it does not even contain an "affirmative allegation" that the affiant's unidentified source "spoke with personal knowledge." For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession. The magistrate here certainly could not "judge for himself the persuasiveness of the facts relied on . . . to show probable cause."

Search warrants issued on the basis of information received from an unidentified informant were upheld in *Rugendorf v. United States*, 376 U.S. 528, 11 L.Ed.2d 887, 84 S.Ct. 825 (1964); in *Jones v. United States*, 362 U.S. 257, 4 L.Ed.2d 697, 80 S.Ct. 725 (1960).

United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965); the court summarizes in part as follows:

> If the teachings of the court's cases are to be followed and the constitutional policy served, af-

> fidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common-sense and realistic fashion. They are normally drafted by non-lawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no place in this area. A grudging or negative attitude by reviewing courts toward warrants would tend to discourage police officers from submitting their evidence to a judicial officer before acting. 380 U.S. at 108.

Chief Justice Crockett and Justice Ellett of the Utah Supreme Court adequately summarized the probable cause upon sworn oath or affirmation rule in dissenting opinions in *State v. Jasso,* Utah Supreme Court, 3 Cr.L.-2103 (1968). The majority opinion is not opposite in that Utah statute requires specifically that the search warrant issue only upon written deposition or affidavit; however, the remarks of Judge Ellett and Justice Crockett are directly in point as to the 4th and 14th amendments and the general law as well as Washington state law on search warrants. The dissentors stated in part as follows:

> The main opinion cites no cases and I know of none which holds that a search warrant issued upon oath but not reduced to writing is unconstitutional. The law is to the contrary as is shown by the following recent cases:
>
> *State v. Malbeck,* 419 P.2d 805 (Wash. 1966), at p. 807:
>
> A signed affidavit for a search warrant is not required. The fourth amendment to the United States Constitution requires only that warrants issue upon probable cause supported by oath or affirmation. RCW 10.79.010 requires only that the application for a search warrant be under oath and that the justice find reasonable cause for the officer's belief.

State v. Walcott, 435 P.2d 994 (Wash. 1967), at p. 999:

The defendant contends, however, that the fourth amendment to the United States Constitution requires that the complaint or affidavits must show probable cause on their face before a search warrant may issue. The defendant concedes that the law of this state requires only an oath or affirmation to support a finding of probable cause. *State v. Malbeck*, 69 Wn.2d 695, 419 P.2d 805 (1966). He argues, however, that the state should follow the federal rule which requires that sworn statements in support of an application for a search warrant be reduced to writing.

Although the federal practice, which results in making and preserving a contemporaneous record of the proceedings before the magistrate, may be preferable; however, it is not a constitutional requirement under the fourth amendment. We adhere to our ruling in *Malbeck* and the cases cited therein.

Scott v. State, 231 A.2d 728 (Md. 1967), involved the question of whether search warrants issued by the magistrate upon affidavits not sworn to before the notary public were valid. The court said at page 731 of the Atlantic Reporter:

The record affirmatively shows that in both instances the applicant was sworn by the judge who issued the warrant. This is sufficient, whatever the notary may have done. *Tucker v. State*, 244 Md. 488, 497, 224 A.2d 111.

The federal rule is set forth in *United States v. Myers*, 270 F.Supp. 734, 737-38 (E.D.Pa. 1967) as follows:

The information does not, on its face, contain sufficient factual information to support a finding by the judicial officer that there was probable cause for the issuance of the warrant. Conclusory allegations such as those contained in Sgt. Michaels' Information are insufficient (Citations omitted), but

the fact that the information itself is not sufficiently detailed to support a finding of probable cause under fourth amendment standards does not terminate the inquiry into the validity of the warrant. The required factual support may be furnished by other means. The fourth amendment requires only that probable cause be 'supported by Oath or Affirmation,' it does not require that the support be in writing. Oral testimony as well as affidavit in writing, may serve as the basis for the issuance of warrant under constitutional standards.

* * *

It is thus obvious that no constitutional rights of the defendant have been abridged.

As to the statutory provision requiring the deposition to be in writing and subscribed by the deponent, I think it is not mandatory that the subscription be affixed before the warrant may issue. A failure to sign before the issuance of the warrant is but a technicality and may be corrected by signing the affidavit thereafter without in any way prejudicing the constitutional rights of the defendant, when the written deposition actually sets out the substance of the oral testimony given to the magistrate. This view is supported by the text material in 47 Am. Jur. *Search and Seizure* Sec. 26, which states: 'A search warrant is usually required to be issued upon a written affidavit, although the better, but not the unanimous, view seems to be that the absence of a supporting affidavit or complaint does not render the warrant void. * * *

Under the circumstances of this case I do not think a criminal in possession of a narcotic drug can complain of a loss of his constitutional right in order to escape the penalty of the law merely because there was a delay in reducing the oral testimony to writing. Not only was there probable cause to induce the magistrate to believe that there was marijuana in the residence of the defendant, there actually was a great quantity in that residence.

"It is high time that courts stop being so overzealous of the rights of criminals and begin to be cognizant of the rights of the long-suffering, decent citizenry of this country." — Ellett, J.

Dissent: I am in accord with what Justice Ellett says and with his conclusion about substantial compliance with the statute in obtaining the search warrant. However, in my view, the far more important consideration in this case is that the denial of the motion to suppress the vital evidence is justified on the broader foundation that it was lawfully obtained even if there had been no search warrant. The fact that effort was also made to obtain a warrant, even if there were some defect in the procedure, should not be deemed to impair the validity of the evidence otherwise lawfully obtained. * * *

The possession of narcotic drugs (marijuana) is a continuing felony. Because it can be quickly and easily hidden or disposed of, there is special justification for considering that peremptory action is not an 'unreasonable' search. The law is that when a police officer has good reason to believe a felony is being committed, he has not only the right but the duty to enter where it is being committed to interrupt its continuance, arrest the perpetrator and take possession of any material evidence bearing on the crime, just as was done here. It is clear that Officer Adair in fact had good reason to believe that a felony was being committed. Upon the basis of the information he had, he said so under oath. His additional effort to obtain a search warrant, when none was necessary, did not destroy his right to enter.

* * *

Under the circumstances here disclosed I do not believe it is shown that the search was 'unreasonable.' On the basis of what I have said above, I think the motion to suppress the evidence was properly denied, irrespective of any irregularity that may have existed in connection with the issuance of the search warrant. I would affirm the conviction. — Crockett, C. J.

Although petitioners repeatedly infer in their brief that the search warrants were issued and later the underlying affidavits supplied, the situation was considerably different and in line with recognized procedures and safeguards. *The search warrants issued after probable cause was fully established by sworn complaints coupled with oral testimony under oath.* The later affidavits merely reconstructed what had been presented to Magistrate Starr at the hearing. In *United States v. Myers,* 270 F. Supp. 734 (1967), a similar procedure of sworn testimony was approved.

> The information does not, on its face, contain sufficient factual information to support a finding by the judicial officer that there was probable cause for the issuance of the warrant. Conclusory allegations such as those contained in Sgt. Michaels' Information are insufficient [See *Aguilar v. State of Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *United States ex rel. Campbell v. Rundle,* 327 F.2d 153 (3rd Cir. 1964); *United States ex rel. De Negris v. Menser,* 247 F. Supp. 826 (D. Conn. 1965), and cases cited therein, aff'd, 360 F.2d 199 (2d Cir. 1966)], but the fact that the information itself is not sufficiently detailed to support a finding of probable cause under fourth amendment standards does not terminate the inquiry into the validity of the warrant. The required factual support may be furnished by other means. The fourth amendment requires only that probable cause be "supported by Oath or Affirmation," it does not require that the support be in writing. Oral testimony as well as affidavit in writing, may serve as the basis for the issuance of a warrant under constitutional standards. *Gillespie v. United States,* 368 F.2d 1 (8th Cir. 1966); *Miller v. Sigler,* 353 F.2d 424 (8th Cir. 1965), cert. denied, 384 U.S. 980, 86 S.Ct. 1879 (1966); *Sparks v. United States,* 90 F.2d 61 (6th Cir. 1937). See and compare Rule 41, Federal Rules of Criminal

Procedure. Pennsylvania permits the use of oral testimony presented to the judicial officer to support the issuance of a warrant, *Commonwealth v. Crawley,* 209 Pa. Super. 70, 223 A.2d 885 (1966), and that procedure satisfies the fourth amendment requirement of reasonableness, *Ker v. State of California,* 374 U.S. 23, 83 S.Ct. 1623 10 L.Ed.2d 726 (1963).

The testimony presented to the Justice of the Peace by Sgt. Michaels, considered in conjunction with the conclusory allegations in the Information, furnished ample factual support for a finding of probable cause, 270 F. Supp. 737-738.

In *Scott v. State,* 231 A.2d 726, the Supreme Court of Maryland discussed yet another instance of informant-based probable cause.

The appellant contends that "the basis for the issuance of the warrant must be within the personal knowledge of the applicant and cannot be certified by his oath or information and belief, even if the facts and sources of information on which his belief was based, such as responsible official sources, were stated."

In passing upon this question it is appropriate to point out that both the affidavit and application for the warrants allege violation of Article 27, §264B. Under that section the mere possession of the proscribed article is itself a criminal offense. Probable cause has been clearly and succinctly defined as: "less than certainty or demonstration but more than suspicion or possibility." *Burrell v. State,* 207 Md. 278, 113 A.2d 884.

The United States rule was declared in *Jones v. United States,* 362 U.S. 257, 80 S.Ct. 725, 736, 4 L. Ed.2d 697, 708, as follows:

'*We conclude therefore that hearsay may be the basis for a warrant.* We cannot say that there was so little basis for accepting the hearsay here that the

Commissioner acted improperly. The Commissioner need not have been convinced of the presence of narcotics in the apartment. He might have found the affidavit insufficient and withheld his warrant. But there was *substantial basis* for him to conclude that narcotics were probably present in the apartment, *and that is sufficient.* * * * Corroboration through other sources of information *reduced the chances of a reckless or prevaricating tale;* that petitioner was a known user of narcotics made the charge against him much less subject to skepticism than would be such a charge against one without such a history.' (Emphasis supplied.)

The rule derived from *Draper v. United States,* 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327, itself not a search warrant case, but declared parallel because it arose under a statute requiring "probable cause" to exist before an arrest could be made.

The rule was discussed at length and fully adhered to in *United States v. Ventresca,* 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684, in which an appeal by the government from a decision adverse to a warrant produced reversal.

The refusal of the Court of Appeals to permit the issuance of a warrant on hearsay from an unknown source as in *Kapler v. State,* 194 Md. 580, 71 A.2d 860, announces no law special or peculiar to Maryland. *Aguilar v. State of Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723, is in full accord. But *Ventresca, supra,* 380 U.S. at page 108, 85 S.Ct. at page 745, at page 688 of 13 L.Ed.2d makes it crystal clear that "in *Aguilar* we recognized that 'an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant,' *so long as the magistrate is 'informed of some of the underlying circumstances' supporting the affiant's conclusions.*" [Emphasis supplied]

The true state of the Maryland law appears precisely to parallel the United States rule. It is very significant that Chief Judge Hammond, citing *United States*

v. Ventresca, supra, with approval, chose to quote this passage from that decision in *Henderson v. State,* 243 Md. 342, 347, 221 A.2d 76, 79,

'This is not to say that probable cause can be made out by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the "underlying circumstances" upon which that belief is based. See *Aguilar v. State of Texas, supra* [378 U.S. 108 at 114, 84 S.Ct. 1509, 12 L.Ed.2d at 729. Recital of some of the underlying circumstances in the affidavit is essential [*as it is under the Maryland statute*] (the emphasized parenthetical words are Judge Hammond's) if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. However, where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. *Jones v. United States, supra,* 362 U.S. [257] at 270, 80 S.Ct. [725] at 735 [4 L.Ed.2d 697] . . .'

Chief Judge Hammond's parenthetical reference to the Maryland statute equates it with the United States rule authorizing hearsay information from a reliable source to be utilized in the determination of "probable cause" if the issuing court is informed of some underlying circumstances within the personal knowledge of the affiant reasonably justifying belief in the reliability of the information received from a known informant.

The anomaly of a decision granting authority to police to arrest upon reasonably reliable information (as in *Murray v. State,* 236 Md. 375, 378, 203 A.2d

908) while denying authority to police to submit that same information to the scrutiny of a judicial officer in an application for a warrant is as unwarranted an action in Maryland as it has been declared in the Federal Courts.

In *Jones v. United States*, 362 U.S. 257, 270, 80 S.Ct. 725, 735, 4 L.Ed.2d 697, it was said:

> What we have ruled in the case of an officer who acts without a warrant governs our decision here. If an officer may act upon probable cause without a warrant when the only incriminating evidence in his possession is hearsay, it would be incongruous to hold that such evidence presented in an affidavit is insufficient basis for a warrant. If evidence of a more judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant must be presented when a warrant is sought, warrants could seldom legitimize police conduct, and resort to them would ultimately be discouraged.

> The late case of *Tucker v. State*, 244 Md. 488, at page 498, 224 A.2d 111, strongly intimates that hearsay may be utilized by an affiant when its reliability has been established, as does the very recent case of *Gatewood v. State*, 244 Md. 609, wherein the Court of Appeals stated at page 615, 224 A.2d 677 at page 681, that a "general statement received from an unnamed informant, who is only alleged to be 'considered reliable' *without any reason given as the basis for that conclusion*, would not be probable cause for the issuance of a warrant." (Emphasis supplied.) *Scott v. State*, 231 A.2d 732-735.

The instant matter includes not only reliable informant information and knowledge of the officers personally, but is further coupled with another informant who is present before the Magistrate and asserts the truth of her personal knowledge conveyed to the court by the detectives. The informant before the court was further demonstrated

reliable by the agreement of her information with that known previously by the officers.

In arguing for granting of the writ, petitioners suggest the issue has never been resolved of whether or not a transcript must be made of the search warrant proceedings. The case law is not in conflict as petitioners assert. The law is clear that the State must demonstrate that probable cause was given for issuance of the warrant where a challenge arises. It is evident from this case that the challenge was met and beyond all doubt it was demonstrated that probable cause was shown to Judge Starr for issuance of the warrants. The procedure herein adopted surpassed any making of a contemporaneous record because it afforded extensive cross-examination of witnesses. Further, a question arises where an informant is present at the hearing of disclosing his or her identity by requiring a contemporaneous record being made.

Petitioners have further asserted doubts concerning the affidavits given by Detectives Fawcett and Waitt, Judge Starr and prosecutor Stang. The record is clear that the affidavits were only *typed* in the prosecutor's office after inquiry into the recollection of each affiant prior thereto. The inferential suggestion by petitioners that the prosecutor authored the affidavits is patently wrong as demonstrated by the testimony of all affiants in superior court.

CONCLUSION

The conclusion is inescapable that the fourth and fourteenth amendment requirements of issuance of search warrants only upon a finding of probable cause based on affirmation and/or oath was met. Further, it is clear that probable cause was thoroughly established in the hearing before Magistrate Starr. Therefore, the petition for writ of certiorari should in all justice be denied as being without merit.

Respectfully submitted,

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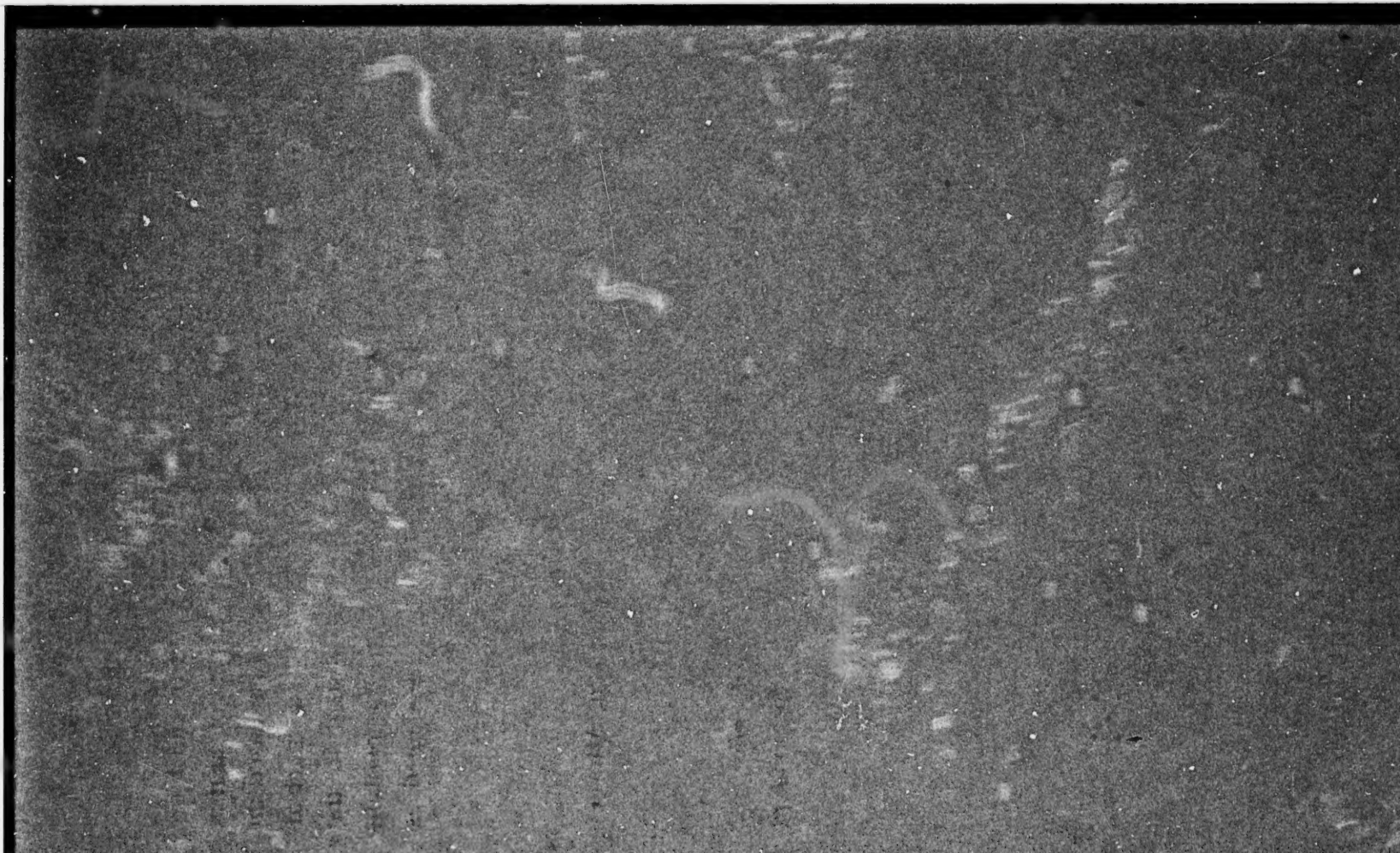

SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968
No. 651

PETER AANDAHL CHRISTOFFERSON, PAUL HOWARD DAVIS, CHRISTOPHER JOHN HAWKINS, JOYCE EDNA CHAKOS and PETER MICHAEL CHAKOS,
Petitioners,

v.

THE STATE OF WASHINGTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Washington

REPLY BRIEF OF PETITIONER

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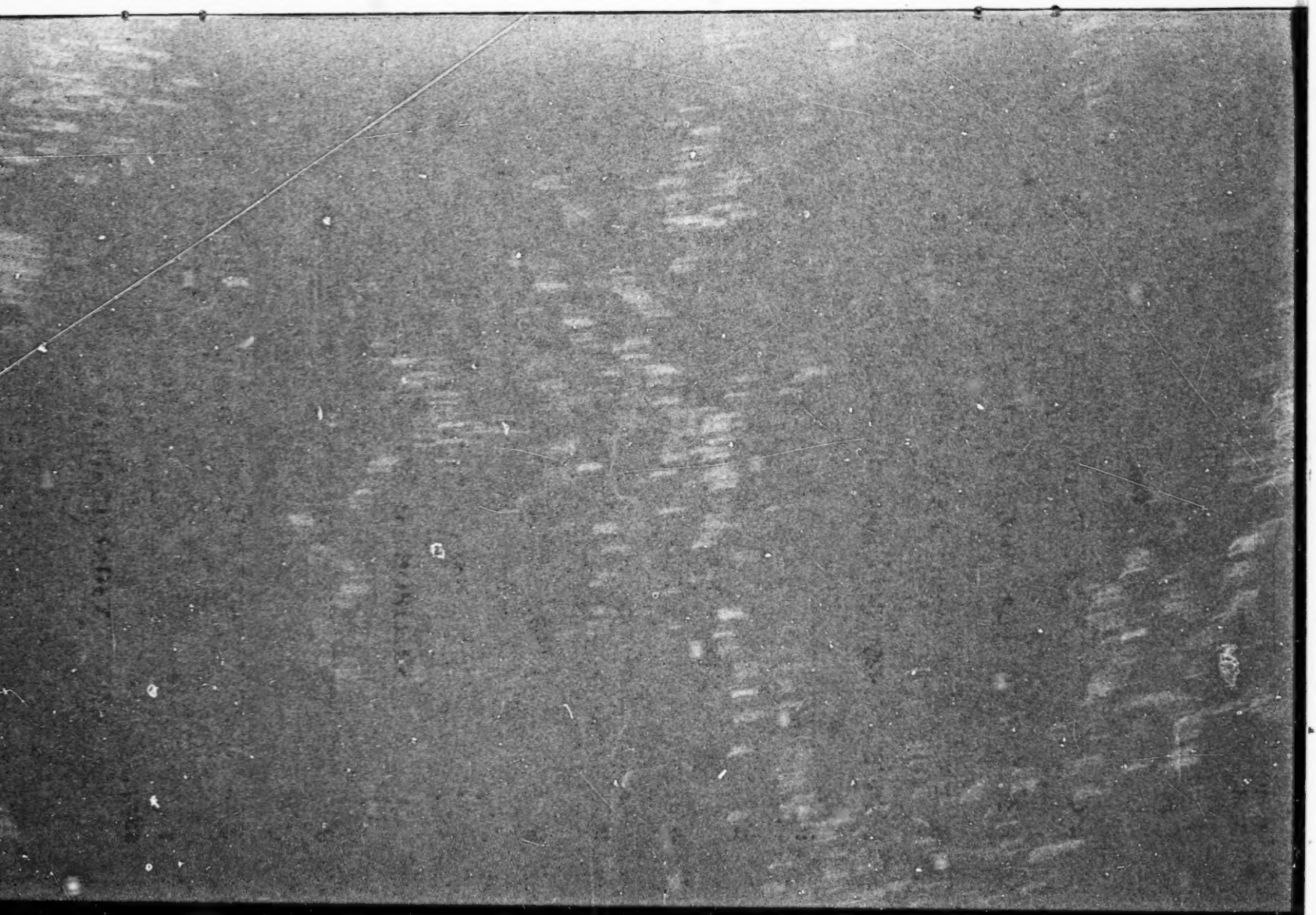

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PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Washington

REPLY BRIEF OF PETITIONER

ARGUMENT IN REPLY

The principal question relied upon by Petitioners to support their application for a writ of certiorari was whether *as a constitutional matter* a magistrate issuing a search warrant must make some form of contemporaneous record of the evidence produced to show probable cause, so that later when the warrant is challenged meaningful review can be had of the adequacy of the proof relied on by the magistrate. Analysis of the authorities produced by the Respondent demonstrates that the issue is one of great and pressing concern to state as well as federal courts and that a constitutional hiatus is rapidly develop-

ing concerning what procedural safeguards are inherent in the Fourth Amendment requirement of probable cause.

Because Respondent's analysis of several recent cases is deficient in many respects this additional reply brief is submitted to call attention to the need for an answer by the United States Supreme Court to this question.

1. State Decisions

Historically, the identical issue here raised was resolved by the Wisconsin Supreme Court in 1928 in *Glodowski v. State*, 196 Wis. 265, 220 N.W. 227 (1928), quoted at length in the Petition for a Writ of Certiorari, p. 9. The state constitutional provision there involved was virtually identical to the Fourth Amendment, and the decision held, as Petitioners here contend, that some form of contemporaneous record must be made of the proof relied on to show probable cause, so that adequate review could be obtained later.

Probably because most states require by statute that the proof in support of a search warrant be reduced to writing, the issue seems to have been dormant for many years.

Since the *Mapp* decision, however, several state courts have rendered decisions touching on one phase or another of this issue, culminating in the present case and its companion decision, *State v. Walcott*, 74 W.D.2d 156, 435 P.2d 994 (1967), which came to the precisely opposite conclusion of the *Glodowski* case. The dispositive language of the *Walcott* decision, as the Petition for a Writ of Certiorari in this proceeding points out, was incorporated in the present decision, and held that it was

not constitutionally necessary to record the evidence relied on to obtain a search warrant.

The *Walcott* decision was in turn based in large part on *State v. Malbeck*, 69 Wn.2d 695, 419 P.2d 805 (1966). Examination of that case discloses that the precise issue there involved was not the same. The issue there presented was whether a warrant could be issued without a written affidavit signed by the officer seeking it, and the Washington Supreme Court held that under the Fourth Amendment the proof could be presented orally. The issue was *not raised* of whether oral testimony, if relied on, must be somehow contemporaneously recorded so a later review could be obtained. What the Washington Supreme Court has done is thus to first conclude in *Malbeck* that oral testimony may be utilized, and then in *Walcott* proceed to the *non sequitur* that since it may be utilized it need not be recorded.

As Respondent points out in its brief the *Walcott* decision has recently been seized up by the dissenters in a recent Utah case, *State v. Jasso*, 21 Utah 2d 24, 439 P. 2d 844 (April 1968), to justify their conclusion that oral testimony need not be recorded, in spite of a statute (as most states have) requiring the magistrate to reduce oral testimony to writing. By the narrowest of margins (the vote was 3-2) the *Jasso* dissent failed to move the *Malbeck-Walcott* concept one step further and hold that in spite of the statute, which all conceded was designed to implement a constitutional provision identical to the Fourth Amendment, no record need be made.

This dissent is particularly interesting in terms of whether certiorari should be granted here, because it points

the way, as the Petition for a Writ of Certiorari predicted, to the future avoidance of *Mapp* by state courts. To get around *Mapp*, the dissenters say in essence, search warrants should be obtainable on oral unrecorded testimony as to probable cause. If this is constitutional (and the dissenters rely on *Malbeck* and *Walcott* to support such a view) then "probable cause" as a constitutional requirement loses its sting. Though not quoted by Respondent the following is the heart of the *Jasso* dissent:

> "... to punish the public by allowing a guilty defendant to go scot-free simply because of a technical violation of the law is a concept which should appeal only to criminally-oriented minds. There could have been no question in the minds of the majority of this court but what the trial court correctly refused to suppress this evidence were it not for the case of *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L.Ed. 2d 1081, decided in 1961. There a guilty defendant was freed by a decision of the Supreme Court of the United States on the ground that evidence was obtained without a search warrant in violation of her constitutional rights. In the instant case all constitutional safeguards were complied with, and even the United States Supreme Court would not reverse it. However, the majority of this court seems to be running scared, and instead of recognizing that the *Mapp* case was erroneously decided, they extend the concept to an unnecessary length in order to free a guilty dope peddler from a deserved conviction. Of course, we all recognize that the *Mapp* case, even though wrong in principle, is binding upon state courts. Still we should not go further than to say that evidence obtained in violation of a defendant's constitutional rights should be suppressed, for that is all the *Mapp* case said. The constitutional right is only to have a warrant issued 'upon probable cause supported by oath or affirmation, particularly describing

> the place to be searched, and the . . . things to be seized.' In this case that was done.
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> "Under the circumstances of this case I do not think a criminal in possession of a narcotic drug can complain of a loss of his constitutional right in order to escape the penalty of the law merely because there was a delay in reducing the oral testimony to writing. Not only was there probable cause to induce the magistrate to believe that there was marijuana in the residence of the defendant, there actually was a great quantity in that residence.
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> "It is high time that courts stop being so overzealous of the rights of criminals and begin to be cognizant of the rights of the long-suffering, decent citizenry of this country." 439 P.2d at 847.

The invitation to police and prosecutors is clear—don't write down your proof of probable cause, because it may be constitutionally inadequate. Instead present sworn but unrecorded testimony, and *Mapp* can be avoided since there is no constitutional right to a review of the record made when the warrant issued.

2. Federal Decisions

Respondent relies on *United States v. Myers*, 270 F. Supp. 734 (E.D. Penn. 1967). Like *Malbeck*, it does not appear that the precise issue was presented as to whether or not as a *constitutional* matter oral testimony, if utilized to prove probable cause, must be recorded somehow. Rather, the issue there seems to have been cast in terms of whether oral testimony could be presented at all. This view is supported by the citations to federal cases in support of the holding that oral testimony can be utilized:

Gillespie v. United States, 368 F.2d 1 (8th Cir. 1966)

does not discuss the procedural question of whether oral testimony must be recorded.

Gillespie relies on *Miller v. Sigler,* 353 F.2d 424 (8th Cir. 1965) Cert. den. 384 U.S. 980, also relied on in the *Myers* case. Again, there is no discussion of whether defendant had a constitutional right to have the proof of probable cause recorded.

Sparks v. United States, 90 F.2d 61 (6th Cir. 1937) is to the same effect.

The *Myers* case does, however, also cite a Pennsylvania decision, *Commonwealth v. Crowley,* 209 Pa. Super. 70, 223 A.2d 885 (1966), which, in discussing *Aguilar,* does say: "The (U.S. Supreme) Court does not say that the Fourth Amendment requires that the sworn facts be reduced to writing, but only that they be presented under oath or affirmation," 223 A.2d 889. This offhand disposition of the issue is the only reference in any of the Federal decisions relied upon which even approaches a discussion of the issue here sought to be raised.

CONCLUSION

In summary, analysis of the Respondent's brief discloses the following:

a. Apart from the present case, the only decisions which discuss in detail and weigh the merits of opposing arguments on whether oral testimony of probable cause must be constitutionally recorded are the *Glodowski* case in Wisconsin, holding it must be, and the dissenters' opinion in the *Jasso* case in Utah, denying such requirement. The *Crowley* decision from Pennsylvania denying

the claim of constitutional right should be considered here also.

b. Most cases touching on the issue, both federal and state, fail to distinguish between the right of the authorities to present oral testimony and the duty to record it so review may be had on the record.

c. In recent years the right to present oral testimony is assumed to carry with it no constitutional duty to record the testimony, and this devise is being used to avoid the implications of *Mapp*.

Respectfully submitted,

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